

# LAWS2018 - Conflict of Laws

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## Topic 2: Personal Jurisdiction

2 grounds of personal jurisdiction at common law: defendant is **present**; and the defendant has **submitted**

### 1. Common Law — Service — Jurisdiction based on Defendant's Presence

#### 1. Individuals

- a. **Presence of individual within jurisdiction required:** The defendant is **required to be present** with the jurisdiction at the time of service (*Laurie v Carroll (1958)*). In this instance the defendant left **BEFORE** service and hence there was no jurisdiction.
  - i. **Facts:** Laurie left the jurisdiction before the writ was issued in anticipation of being served, however the intention was irrelevant.
- b. **Defendant required to be in jurisdiction:** In *Gosper v Sawyer (1985)*, the Industrial Commission had no power under NSW law to order service of the application out of the jurisdiction, as the defendant was not within the jurisdiction at the time. Jurisdiction is prima facie exercisable only against those present within the limits of its territory at whatever be the relevant time or times (**at 564**).
- c. **Even if temporary within jurisdiction, it will be valid:** A person who is present, even if temporarily, will be within jurisdiction (*Maharaneef of Baroda v Wildenstein*)
- d. **Jurisdiction established if leaving after initiating process with knowledge:** A person who left the place was issued and who **either KNEW** that process had been issued or left to evade service of process will be regarded as within the jurisdiction (*Joye v Sheahan (1996)*). Here Joye's solicitor had been faxed with summons on Joye was informed on that day but still fled.
  - i. **Facts:** A summons under s 569B of the *Corporations Law* was issued against the appellant at a time when he was in Australia. Later an order was obtained from a Registrar for substituted service on the appellant. At that time the appellant was not in Australia. The appellant failed at first instance to have the order for substituted service set aside, but appealed.
- e. **Came into jurisdiction just to get served — valid:** Valid if the person came into jurisdiction specially to be served (*Perrett v Robinson [1985]*). In this case, friends had arranged to go into Queensland at the same time to be served in order to receive compensation (which technically came from the person's insurer for the car crash).
  - i. **Exception — fraud:** Exception if defendants is tricked/**fraudulently** enticed or **coerced**
- f. **Solicitor authorised — valid:** If solicitors at time of issue are authorised to accept service even if defendant is not present, defendant is within the court's jurisdiction (*Re Mustang Marine [2013]*)

#### 2. Personal Service

- a. **State / NSW:**
  - i. **Personal service required only in certain circumstances:**
    - 1) **Can** be personal: Any **document** required or permitted to be served on a person in any proceeding **may** be **personally served**, **but need not** be personally served unless these rules so required the court so order (*Uniform Civil Procedure Rules 2005 (NSW) r 10.20*)
    - 2) **What must be personally served: Except** as otherwise provided by these rules:
      - a) **NSWSC/DDT/DC/IRC/LEC:** Any **originating** process in the Supreme Court, Industrial Relations Commission, Land and Environment Court, District Court or Dust Diseases Tribunal **must** be personally served (**UCPR r 10.20(2)(a) AND**
      - b) **Local Court - originating process:** Any originating process in the Local Court must be served in one of the following ways — it **may** be **personally** served on the defendant; it may be **left, addressed to** the defendant, at the defendant's business or **residential address** with a person who is apparently of or above the age of 16 years and apparently employed or residing at that address; if served by the Local Court, it may be sent by **post, addressed to the defendant**, to the defendant's business or residential in an envelop marked with a return address (**UCPR r 10.20(2)(b) AND**
      - c) **Local Court - orders:** It **may** be **personally served** on the person; it may be **left addressed** to the person at that person's business or resident address (**UCPR r 10.20(2)(c)**)
      - d) **District/Local Court — Subpoena for production:** Any **subpoena** for production in proceedings in the **District** Court or the **Local** Court **must** be served in one of the following ways — it may be **served personally** on the person to whom it is directed; it may be **left**, addressed to the person to whom it is directed at that person's business or residential address who is apparently above 16 years; it may be **sent by post, addressed to the person** to whom it is directed to the person's business or residential address (**UCPR r 10.20(2)(d)**)

- 3) If **letter returned**: **HOWEVER**, if an envelope posted is returned to the court by postal authority as not having been delivered, service is **NOT effective** (UCPR r 10.20(3))
- ii. **How personal service effected generally**: Personal service is effected by leaving a copy of the document with the person or if the person does not accept, putting the copy down in their presence and telling the person the nature of the document (UCPR r 10.21(1))
  - 1) **Violence**: If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person (UCPR r 10.21(2))
- iii. **Crown Solicitor**: For the purposes of section 6 of the *Crown Proceedings Act 1988*, personal service of a document on the Crown Solicitor may be duly effected by leaving the document at the office of the Crown Solicitor with a person who is apparently a member of the Crown Solicitor's staff (UCPR r 10.23)
- iv. See more regarding Judicial Officers, Inmate of correctional centre, "keeps house" (UCPR 4 10.24-10.26)
- v. **Proof of identity**: For the purposes of proof of service, evidence of a statement by a person of his or her identity or of his or her holding some office is evidence of his or her identity or that he or she holds that office (UCPR r 10.27)
- b. **Federal**:
  - i. **When originating application may be served outside Australia**: Subject to r 10.43 an originating application may be served on a person in a foreign country in a proceeding that includes any one or more of the kinds of proceedings mentioned in the following table (FCR r 10.42)
    - 1) **See Table for proceedings in which originating application may be served outside Aus**:
      - a) Proceeding based on a cause of action arising in Australia
      - b) Proceeding based on a breach of a contract in Australia, etc.
  - ii. **Effective when**: Service of an originating application on a person in a foreign country is effective for the purpose of a proceeding **ONLY IF**: (FCR r 10.43)
    - 1) **Leave**: The Court has given leave under sub-rule (2) before the application is served; **OR**
      - a) A person may apply to the Court or leave to serve an origination application on a person in a foreign country in accordance with a convention, the Hague Convention or the law of the foreign country (FCR r 10.43(2))
        - i) **Conditions** detailed under FCR r 10.43(3)-(5)
    - 2) **Court confirms if service w/o leave**: The Court confirms the service under sub-rule (6) (FCR 10.43(1)(b)); **OR**
      - a) **If** an originating application was served on a person in a foreign country **without** the leave of the Court, a party **MAY** apply to the Court for an order confirming the service (FCR r 10.43(6))
        - i) **Conditions** detailed under FCR r 10.43(7)
    - 3) **Waiver**: The person served waives any objection to the service by filing a notice of address for service without also making an application under rule 13.01 (FCR 10.43(1)(c))

### 3. Substituted Service

- a. **Court order for substitute — prior**: If a document that is required or permitted to be served:
  - i. (a) cannot practicably be served on the person, **OR**
  - ii. (b) cannot practicably be served on the person in the manner provided by law,
 the court **MAY**, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned (UCPR r 10.14)
- b. **Court order — after the fact**: If steps have been taken, otherwise than under an order under this rule, the court **MAY**, by order, direct that the document be taken to have been served on that person on a date specified in the order (UCPR r 10.14(3))

### 4. Corporation Service

- a. **All companies amenable**: All companies conducting business in Australia are amenable to jurisdiction of **ALL** state and territory court

#### Australian AND Foreign Registered Businesses

- b. **All company to be registered**: The *Corporations Act* requires registration in Australia before carrying out business in Australia (s 601CD), to have a registered office (s 601CT) **AND** to appoint local agent (s 601CG)
  - i. **Exception for NZ**: Note also *Trans-Tasman Proceedings Act s 9* – ability to serve in NZ

- c. **Australian Registered Company — Personal service on a corporation:** Personal service of a document on a corporation is effected —
  - i. **Principal:** (a) by personally serving the document on a principal officer of the corporation, **OR**
  - ii. **Any other manner:** (b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation (UCPR r 10.22)
- d. **Corporation's Generally — Service of DOCUMENT:** A document may be served on a company by leaving or posting it to the company's registered office; **OR** delivering a copy of the document personally to a director of the company who resides in Australia; **OR** if a liquidator or administrator of the company has been appointed — leaving it or posting it to the liquidator's or administrator's office (s 109X(1)). Alternatively, service can be achieved by personal service on the director who resides in Australia (s 109X(2))
  - i. **Does not apply:** s 109X does not apply to if the company may be served under s 9 of the *Service and Execution of Process Act 1992* (SEPA s 9(9))
- e. **For local and foreign corporations — Service of DOCUMENT on registered body:**
  - i. Any local or foreign company can be served by leaving the initiating process at its registered office or, for a foreign company, with its local agent, or by sending it to the registered office or local agent by post (s 601CX(1) *Corporations Act*)
  - ii. Personally delivering copy to 2 directors if 2 or more live in Australia (s 601CX(3))
  - iii. Personally delivering to sole director of foreign proprietary company who resides in Australia (s 601CX(3A))
  - iv. **Does not apply:** s 601CX *Corporations Act* 2001 do not apply to a process, order or document that may be served under this Act (SEPA s 9(9))
- f. **Service on companies and registered bodies in a DIFFERENT state or territory:**
  - i. **Company's registered office:** Service of a process, order or document under this Act on a company is to be effected by leaving it at, or by sending it by post to, the company's registered office (*Service and Execution of Process Act 1992* s 9(1))
    - 1) **Personally to director:** Without limiting the operation, a process, order or document may be served on a company by delivering a copy of it personally to a director of the company who reside in Australia (SEPA s 9(2))
    - 2) **Liquidator:** If a liquidator of a company has been appointed, the company may be served by leaving it at the address of the administrator (SEPA s 9(4A))
  - ii. **Registered body's office:** Service on a registered body is to be effected by leaving it at, or by sending it by post to, the body's registered office (SEPA s 9(5))
    - 1) **2 directors:** A registered body may be served by delivering a copy of it personally to each of 2 directors of the registered body who reside in Australia (SEPA s 9(7)).
    - 2) **Liquidator:** If a liquidator of a company has been appointed, a process, order or document may be served on the company by leaving it at the address of the administrator (SEPA s 9(8))
  - iii. **Registered Foreign Company:** If the registered body is a registered foreign company, a process, order or document may be served by leaving it, or by sending it by post to:
    - 1) **Local agent:** the address of a local agent of the foreign company notice of which has been lodged under the *Corporations Act 2001*; **OR** (SEPA s 9(6)(a))
    - 2) **Last known address:** If a notice or notices of a change or alteration in that address has or have been so lodged — the address shown in the last-mentioned notice or the later or latest of those last-mentioned notices (SEPA s 9(6)(b))
    - 3) **2 directors:** A registered body may be served by delivering a copy of it personally to each of 2 directors of the registered body who reside in Australia (SEPA 1992 s 9(7)).
    - 4) **Liquidator:** If a liquidator of a company has been appointed, the company may be served by leaving it at the address of the administrator (SEPA s 9(8))
  - iv. **Corps Act does not apply:** s 109X and s 601CX *Corporations Act* 2001 do not apply to a process, order or document that may be served under this Act (SEPA s 9(9)).
  - v. **Initiating process may be served in any part of Australia:**
    - 1) **Can serve in another State:** An initiating process issued in a State may be served in another State (SEPA s 15(1))
    - 2) **Service on individual:** Service on an individual must be effected in the same way as service of such an initiating process in the place of issue (SEPA 1992 s 15(2))
    - 3) **Service of company must** be effected in accordance with s 9 (SEPA 1992 s 15(3))

- 4) Service of any other body corporate **must** be effected in accordance with s 10 (*SEPA s 15(4)*)
- 5) Service on a body politic (Cth or a State) **must** be effected in the same way in which process of the Supreme Court of the State in which service is to be effected may be served on the body politic (*SEPA 1992 s 15(5)*)

### Foreign Unregistered Business

- a. **Test:** The unregistered foreign corporation **needs to be** 'present in the jurisdiction'. For corporations, presence means 'carrying on business in the forum' (*National Commercial Bank v Wimbourne*), which usually involves a series or repetition of acts. Those acts will commonly involve "activities undertaken as a commercial enterprise for the purpose of profit on a continuous and repetitive basis". This is a question of fact for the court to determine according to the following indicia (*Wimbourne at 165*):
  - i. **Agent:** The company is represented in the forum by an agent who has authority to make binding contracts with persons in the place; **AND**
    - 1) Ministerial agent — no business: A corporation will not have presence if the agent is 'a mere ministerial agent' or is carrying on his own business and **NOT THAT** of the foreign corporation (*National Commercial Bank v Wimbourne at 165*).
      - a) Example: An example would be a foreign company that sells goods through a local distributor.
        - i) Facts in *Wimbourne*: NCB was a corporation established under Saudi Arabian law. NCB had no branch office, agency or place of business in NSW. NCB had arrangement with NSW bank which involved bank collecting periods from NSW importers and remitting proceeds to NCB in Saudi Arabia. NCB was requested by the plaintiff to honour its guarantee to the full amount that was owed by the principal.
    - 2) Having local solicitors to defend — no business: Accordingly, presence is not established by showing that the foreign corporation has appointed a local solicitor to commence or defend particular legal proceedings in the jurisdiction (*Wimbourne at 166*)
  - ii. **Fixed place:** The business is conducted in a fixed and definite place in the forum; **AND**
    - 1) Factors: It is not essential to find but it is relevant to consider whether the name of the foreign corporation is displayed at the agent's place of business, whether it owns or leases the premises or pays the rent, whether it employs staff or particular staff are allocated by the agent to its business and it pays their wages or pays office expenses, indeed anything which one would expect to find if a person doing business established or maintained a place or office for doing it in a particular territory (*National Commercial Bank v Wimbourne at 166*)
  - iii. **Substantial period of time:** The business has been conducted in the forum for a sufficiently substantial period
- b. **If subsidiary:** In *Adams v Cape Industries*, it suggested a court **cannot lift the corporate veil** even if "justice requires" **except** where the subsidiary company is a "mere facade" acting as an authorised agent of its parent when construing a statute, contract or other document.
  - i. **Factors establishing agency:** (**THESE FACTORS ARE ONLY FOR SUBSIDIARIES**)
    - 1) Fixed place of business: Whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;
    - 2) Directly reimbursed: Whether the overseas corporation has directly reimbursed him for:
      - a) the cost of his accommodation at the fixed place of business;
      - b) the cost of his staff;
    - 3) Contributions: What other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative;
    - 4) Remunerated: Whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way;
    - 5) Degree of control: What degree of control the overseas corporation exercises over the running of the business conducted by the representative;
    - 6) Reserves resources for parent: Whether the representative reserves
      - a) Part of his accommodation
      - b) Part of his staff for conducting business related to the overseas corporation;
    - 7) Displays the overseas corporation's name: Whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;

## 2. Exclusion of Foreign Law

Exclusionary doctrines: Assume foreign law has been proved and chosen by the forum's usual choice of law rule to govern the relevant issue... the question then becomes whether the forum would refuse to apply the foreign law merely because it does not exactly accord with the forum's moral values? There are 2 main reasons:

- Independence and territoriality of sovereignty: each sovereign can only assert its interests within its own territorial bounds
  - c. **Sovereignty**: By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority (*AG (NZ) v Ortiz* [1984] AC 1, 21 (Lord Denning MR))
- Public policy of the forum: Some foreign laws are just too offensive to the forum state to be given effect
  - d. **Act of state doctrine** — no matter if law good or bad, if it is category, then exclude: "A principle of international law, which has long been recognised, namely that, in general, courts will not adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign's own territory. The principle rests partly on international comity and expediency (*AG (UK) v Heinemann Publishers* (1988) 165 CLR 309 (the Court minus Brennan J))

### Foreign Penal and Revenue Laws

1. **Revenue Laws**: Includes taxes, charges, probate and death duties, capital gains, custom duties. A court will not entertain foreign claim that seeks to enforce a foreign revenue debt by indirect means.
  - a. **Foreign courts cannot enforce revenue laws (whether tax or debt owing the foreign government)**: *Government of India v Taylor* [1055] AC 496 (HL): Courts of one country **do not** have regard to the revenue laws of another and therefore **will not allow** judgments for foreign taxes to be **enforced**.
    - i. **Would be extension of sovereign power ≠ not allowed**: "[E]nforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another...is (treaty or convention apart) **contrary to all concepts of independent sovereignties**." (Lord Keith of Avonholm)
  - b. **Foreign tax judgments not enforced**: *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324: Australia **has not** included the new Art 27 in its treaty with United States. The *Foreign Judgments Act 1991* (Cth) **exclude** foreign tax judgments.
    - i. **Not incorporated in domestic law + not even in treaty in this case**: A new Art 27 of the Model Convention with Respect to Taxes and Income on Capital 2003 (INT), seeks to abrogate the exclusionary rule. Australia has included the new Art 27 in its treaty with New Zealand, France and Norway. **However, this article is not included in the treaty with United States**. Furthermore, it was not incorporated into domestic law (at [27])
    - ii. **Cannot enforce foreign tax judgments**: Nor can a judgment of the United States Tax Court be enforced in Australia. The *Foreign Judgments Act 1991* (Cth) defines an "enforceable money judgment" to mean one under which an amount of money is payable other than an amount payable in respect of taxes or other charges of a similar nature."
      - 1) **Facts**: Jamieson is the executrix of the estate of her late father, who died in the US in 2004. All the assets of the estate were situated in NSW. Probate of the will was granted to Ms Jamieson by this court in 2004. The Internal Revenue Service of the US obtained a judgment from the United States Tax Court against the estate for USD 1,149,104.05 in 2006. Ms Jamieson seeks a determination that she is not required to admit the Commissioner as a creditor of the estate and is entitled to distribute the estate to the persons entitled.
  - c. **Disguised tax ≠ unenforceable**: The action is in the nature of a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another (*Sydney Municipal Council*)
    - i. **Facts**: The NSW Moore St Improvement Act of 1890 authorised Sydney Municipal Council to **carry out improvements** on Moore St and **recover contributions** from property owners. One such owner was a British. Sydney Municipal Council sued in the UK to **recover the unpaid contributions** from the owner's indemnifier (ie like an insurer). The sole object and intention of the Act was to provide that within that area where the claim was recoverable, it might be recovered by an action.
  - d. **INDIRECTLY foreign rev. laws ≠ unenforceable**: *Bath v British and Malayan Trustees* [1969]: In **no circumstances** will the courts directly or indirectly enforce the revenue laws of another country
    - i. **Facts**: In Singapore, an executor (a private individual) got a grant of probate of Singapore resident who held property in NSW. The Singapore Court granted probate on the condition of remission to Singapore of the outstanding probate duties (ie the executor pays death tax). In NSW, the executor sought orders to deal with the NSW property of the deceased, to exclude the death tax.

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## Topic 7: Mandatory Rules and Forum Statutes

### What are mandatory laws?

The term 'mandatory law' denotes 'laws the respect for which is regarded by a country as so **crucial for safeguarding public interests** (political, social or economic organisation) that they are applicable to any contract falling within their scope, regardless of the law which might otherwise be applied'. Typically, the term denotes statutes that exclude the operation of otherwise applicable choice of law rules.

Statute are interpreted with reference to the lex fori: In Australia/NSW, the court considers the application of a forum statute with reference to the principles of **statutory interpretation of the lex fori**. The wording and construction of the statute determines whether it is mandatory

- "Policy of the law" — "Courts may disregard or refuse effect to contractual obligations which, whilst not directly contrary to any express or implied statutory prohibition, nevertheless contravene "the policy of the law" as discerned from a consideration of the scope and purpose of the particular statute." (*Akai*)

### 0. General Rule & Presumption

#### 1. **General Rules as to whether Statute applies:**

- a. **Applies only if lex causae**: The presumption is to: Apply **normal choice of law rules**, **then** apply **statute only** if it is **part of lex causae** (*Wanganui*); **OR**
- b. **It applies generally extra-territorially**: Consider if **forum statute intended to be generally applicable**; if so apply it with no choice of law process

#### 2. **Key Presumption: Statute bound by geographical limitation, unless stated otherwise**: In *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581: **In the absence of any countervailing consideration**, the principle is that **general words should not be understood as extending to cases** which, according to the rules of private international law administered in our Courts, **are governed by foreign law**. **Section 5 should be confined by construction** to those obligations of which the governing or proper law is that of New South Wales.

- a. **Facts**: By s 5 *The Interest Reduction Act 1931* of NSW: "Subject to this Act an obligation to pay interest shall be deemed to be satisfied by payment of a sum equal to the amount which would have been payable as interest if this Act had not been enacted, less nine-fortieths of such amount." And by sec. 4 (5) it is enacted that "**this Part of this Act shall take effect notwithstanding any agreement to the contrary.**"
- b. **Held**: Provisions of NSW statute did not apply to NZ party's obligation. It was presumed to be only limiting contracts within NSW. Dixon J stated that the proper law of the contract and of the debenture is NZ law.

### 1. Overriding Forum Statutes

- Our mandatory law works **regardless of the choice of law**, **but** sometimes **there are conditions** that have to be met in order for it to apply

#### 3. **Workers Compensation Act: Workers Compensation Act 1987 (NSW)** (amended 2002)

- a. **Legislation**:
  - i. 9AA (1) Compensation under this Act is only payable **in respect of employment that is connected with this State**.
  - ii. 9AA (2) The fact that a worker is **outside this State** when the injury happens **does not prevent compensation** being payable under this Act in respect of **employment that is connected with this State**.
  - iii. 9AA (3) A worker's employment is connected with **the State in which she usually works or is based** [and if none, her employer's principle place of business]
  - iv. 150A **If compensation is payable** under a statutory workers comp scheme of a State/Territory, the **substantive law of that State/Territory governs whether or not** a claim for damages in respect of the injury can be made and, if so, the determination of the claim.
- b. **Foreign law does not time bar indemnity, before an award of compensation + Extends beyond NSW as long as there is connection + (Texas law does not time bar statutory claim, only tort): *United Airlines Inc v Sercel Australia Pty Ltd* [2012] NSWCA 24, [28]-[32], [77] (Allsop P)**
  - i. **Employer's statutory claim for indemnity is not time barred due to application of law of Texas**:  
No, the employer's claim is based on the *Workers Compensation Act 1987* (NSW). The fact that

the worker is outside the State when the injury happens **does not** prevent compensation being payable under the Act as long as the worker's employment is **connected with the state** in which he or she usually works or in which he or she is usually based or in which the employer has its principal place of business.

- 1) **Application — Furthermore, claim of statute NOT tort:** Mr Arora's (employee) direct claim is barred by the 2-yr limit in the Texas law (as the law of the place of the tort) under the Warsaw Convention. **However**, the employer's claim is **not in tort, it is under an NSW statute** and Texas law does not affect the employer's rights here.
- ii. **Warsaw Convention time-bars "right to damage" NOT indemnity:** No the employer's right was not **time-barred** by the **Warsaw Convention**. The Warsaw Convention extinguishes the "right to damage". But **here is "right to indemnity"**. The **right to indemnity does not accrue until payment of the compensation** is made. It would be an **unexpected operation of a law if a time bar provision could** operate to extinguish the right to sue, **before it arose**. The Warsaw Convention deals with the claims of passengers, consignors, and consignees and the liability of carriers therefore, and does not create a right of action for contribution or indemnity in the context of worker's compensation.
- 1) **Facts:** An NSW based employee on a business trip got injured on United Airlines flight during landing at Texas. His NSW based employer paid compensation under WCA (NSW), then sued United Airlines in NSWSC, claiming indemnity under WCA (NSW). WCA (NSW) 151Z allowed an employer to compensate an injured employee first, then get indemnified by the person liable for the injury. One argument by United Airlines was the employer's claim for indemnity would be time-barred under the law of Texas (> 2 years).

#### 4. **Defamation Act:** *Defamation Act 2005 (NSW) s 11*

##### a. **Legislation:** Intrastate defamation

- i. **If within one State, apply that state's defamation law:** (1) If a matter is published **wholly** within a particular **Australian jurisdictional area**, the **substantive law** that is applicable in that area **must** be applied in this jurisdiction to determine any cause of action for defamation based on the publication.
- ii. **If defamation across Australia, apply the law with closest connection:** (2) If there is a **multiple publication** of matter in **more than one Australian jurisdictional area**, the **substantive law** applicable in the **Australian jurisdictional area** with which the harm occasioned by the publication as a whole has its **closest connection must be applied** in this jurisdiction to determine each cause of action for defamation based on the publication.
- iii. No renvoi

#### 5. **Competition and Consumer Act:** *Competition and Consumer Act 2010 (Cth) ss 5-6*

##### a. **Legislation:**

- i. **Extends the ACL to outside of Australia:** 5(1) Each of the following provisions:
  - 1) (a) Part IV [restrictive trade practices]...
  - 2) (c) [Most of] the ACL [including **misleading or deceptive conduct; unconscionable conduct; consumer guarantees**]...
  - 3) extends to the engaging in conduct **outside Australia** by:
  - 4) (g) **[companies] incorporated or carrying on business within Australia**; or
  - 5) (h) Australian **citizens**; or
  - 6) (i) persons **ordinarily resident** within Australia.
- ii. **Conflict of laws in the ACL:** 67 If
  - 1) (a) the proper law of a [consumer contract] would be the law of any part of Australia **but for a term of the contract that provides otherwise; or**
  - 2) (b) a [consumer contract] contains **a term that purports to substitute**, or has the effect of substituting, the following provisions for all or any of the provisions of this Division [relating to **consumer guarantees**]:
    - a) (i) the provisions of the law of a country other than Australia;
    - b) (ii) the provisions of the law of a State or a Territory;
  - 3) the provisions of this Division [relating to consumer guarantees] **apply ... despite that term**.
- b. **It means that Australian ACL guarantees apply no matter what, so long as the companies incorporated or carrying on business within Australia / Australian citizen / personal ordinarily resident within Australia. Guarantee ACL has to apply, even if there is a foreign choice of law clause as the proper law**

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## Topic 8: Recognition and Enforcement of Foreign Judgments

### 1. Enforcement at Common Law

1. **Background:** Foreign judgments that are **NOT** covered by a statutory scheme, the only basis for recognition and enforcement is the common law principles. Can **ONLY** apply one **OR** the other.
2. **Terminology:**
  - a. *Judgment in personam*: judgments that impose a personal obligation, such as damages for breach of contract or in tort or decrees for specific performance or an injunction
  - b. *Judgment in rem*: Not a personal liability. Judgment that affects the status of a person or corporation or affects or creates an interest in property, e.g. family law, bankruptcy and corporations
  - c. *Judgment debtor*: Person subject to a court order to pay a sum of money to the judgment creditor (person who lost)
  - d. *Judgment creditor*: Person who is owed money by the judgment debtor (person who won)
3. **Difference between enforcement and recognition:** Enforcement is trying to 'enforce' a judgment here. Recognition is just acknowledging that there has been a foreign judgment.
4. **TEST: For a foreign judgment to be recognised at common law, 4 conditions must be satisfied:**
  - a. **Jurisdiction in the international sense:** The foreign court must have exercised a jurisdiction that Australian courts recognise. The **competence** that the law of the forum recognises that a foreign court can exercise: **NOT** according to the foreign law. **BUT according to the forum law** (Australian common law). Traditionally, that jurisdiction can arise in one of 2 ways: by the presence or residence of the defendant in the foreign jurisdiction; **or**, by the voluntary submission by the defendant to that jurisdiction.
    - i. **Presence:**
      - 1) **Natural Persons:** The defendant will be present if they were personally served with originating process while he or she was **physically present** within the jurisdiction of the adjudicating court, **even though** that **presence was only temporary**.
        - a) **Natural persons HAVE to be present on the territory in order to have jurisdiction in the international sense:** (**Buchanan v Rucker (1808) 103 ER 546**)
          - i) **Facts:** A Tobago court gave a default judgment against an English merchant. The Tobago **originating process had been nailed to the court door**. **This constituted valid service under the law of Tobago**. The defendant **never appears to have been within the limits of the island** not to have had any attorney there, nor to have been in any other way subject to the jurisdiction of the court at the time.
          - b) **Inducing or enticing a natural person to come within a jurisdiction to be served is still valid for presence** (**Close v Arnot [1997] NSWSC 569**). It is enough that the D is present in the forum at the time of service.
            - i) **Facts:** D left Sydney on 18 May 1994 arriving in Los Angeles on the same day for a world-trip holiday. He was keen to visit his son William whilst in the US and at that stage William was living with the Ps in NY. The initiating process at the NY was filed on 20 May 1994. The 1st P booked hotel for D at the NY and then served him there on 27 May 1994. The NY court gave a default judgment against D, following D's failure to appear. In the NSW JRE proceedings, the 1st P conceded that he had deceived the NY court about the maintenance payments that had been received.
          - c) **Fraud exception:** There **may** be an exception if the defendant was induced by fraud (**Close v Arnot**). If you made a promise about receiving something and not actually delivering it to the person you are inducing.
          - d) **Not through agent, not substituted service:** For these purposes, a natural person cannot be present in a foreign jurisdiction through an agent or partner carrying on business there on his or her behalf.
        - 2) **Corporations:** For a trading company is concerned, decent upon the extent to which the company has a place of business in the relevant territory.
          - a) **Even if the company trades in the country, not enough. If it has a subsidiary, it is not 'present'. The trading has to be reinforced with resident agent or a branch office. Something physical here** (**Adams v Cape Industries [1990]**)
            - i) **Trading alone is insufficient, need resident agent or branch office:** But **trading in country is insufficient**, by the standards of English law to entitle the courts of the country to take in personam jurisdiction over the trader. The trading **must** be reinforced by some **residential feature, be it a branch office or a resident agent with power to contract**. The fundamental question is whether the US court was entitled on territorial grounds, to take jurisdiction over Cape.