

# *LDR Exam Notes*

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# *How to structure your responses in an e-exam*

This is the recommended structure I followed for every type of question to effectively and clearly answer questions on the e-exam platform. My notes are structured to reflect this structure. The examples provided along with the below headings match the heading on page 17-21.

TOPIC (Big HEADING - centred and underlined e.g. 'Cost Orders')

Question (Big HEADING centred e.g. 'Costs Indemnity Rule')

Sub-heading 1 (Big HEADING e.g. 'Exceptions to the 'Costs Indemnity Rule')

Sub-heading 2 (Medium HEADING e.g. 'Exception 4: Rejection of Settlement')

Sub-heading 3 (Small Green HEADING e.g. 'After Commencement: *Calderbank* Offer - common law')

Sub-heading 4 (BOLD HEADING e.g. 'Is the offer a *Calderbank* offer?')

# *Jurisdiction*

## Typical questions:

Which Court should [PERSON] commence proceedings against [D] in and why?

In which court do you think [P] should issue proceedings, and why?

## Introduction

For [P]'s proceeding to be heard before the relevant Court, the Court will need to possess the jurisdiction to do so. Jurisdiction is 'the scope of the Court's power to examine and determine facts, interpret and apply the law, make orders and declare judgment' (*Wardley Australia v WA*). To hear [P]'s claim, the Court must have subject matter and territorial jurisdiction (*Laurie v Carrol*).

Answer:

1. Subject Matter Jurisdiction (which Court is most appropriate to hear the kind of matter depending on the relief sought, expertise required and the complexity of the matter)
2. Territorial Jurisdiction (how it will be acquired)

## Subject Matter Jurisdiction

### State Jurisdiction

#### Supreme Court of Victoria (SCV)

The SCV has unlimited jurisdiction in relation to Victoria and is the superior court of Victoria *per s 85(1) Constitution Act*. Therefore, prima facie, the action can be heard by the SCV. Appeals from the Supreme Court Trial Division are heard in the Court of Appeal.

There are cost consequences to pursuing a matter in the SCV. If [P] were to pursue in SCV and P's recovery is **under 100k**, .....

...

## Supreme Court > County Court or Federal Court

[P] is advised to pursue this claim in [INSERT CAUSE OF ACTION e.g. tort, negligence, breach of contract, personal injury] in the Supreme Court. This claim will not be suitable for the Magistrates Court because MC has a jurisdictional limit of up to \$100,000 in respect of a claim for damages or equitable relief per s 100 of MCA, which is under the amount that [P] is claiming (i.e. [insert amount]>\$100,00). Although both the Supreme Court per s 85(1) of the Constitution Act and the County Court per s 37(1)(a) of the County Court Act have unlimited jurisdiction, the facts suggest that the case would **complex** (because of [insert reason e.g. complex questions of causation, vicarious liability]). Because it is a complex case, the County Court may not be as appropriate. However, the risk is that if [P] were to pursue in Supreme Court and [P]'s recovery is under 100k he/she may only be entitled to the costs that he/she would have recovered had he/she brought the proceeding in the County Court, less the amount equivalent to the additional costs incurred by [D] because the proceedings were brought in the Supreme Court, rather than the County court (SCR r 63.24(1)).

It is also advisable that [P] does not pursue claim in Federal Court.

### Option 1: If there is no cause of action that is Cth

This is because the facts do not indicate that a federal cause of action has accrued (such as an ACL action or action under other federal law).

### Option 2: If there is a cause of action that is Cth (RED FLAG: there is two claims - one federal and one state)

As there is a federal a cause of action, being [insert federal a cause of action], [P] will need to rely on accrued jurisdiction to hear both the federal and state causes of action together (s 22 Federal Court Act). The FC will have accrued jurisdiction to **hear a state claim together with the federal claim** only if the claims are a single controversy (*Fencott*). Applied here,

...

# Territorial Jurisdiction

Introduction: The Court will need to have territorial jurisdiction in relation to the proceeding...

## State Court (pick one of the below)

TJ may be acquired by (1) the parties being present within the jurisdiction (*Laurie*), (2) [D] submitting to the jurisdiction (filing an unconditional appearance per r 8.05 or including a clause to this effect) or (3) valid service outside the jurisdiction (SEPA if interstate, SCR r 7.01 if international).

## Presence within Jurisdiction

... , one way this is achieved is by the parties being present within the jurisdiction (*Laurie*).

### Option 1: Both [P] and [D] residing in the same place

Because [P / D] is within the jurisdiction, residing in [insert place], Court has territorial jurisdiction over [P / D] (*Laurie v Carrol*).

### Option 2: [P] and [D] residing in different places (e.g. Vic vs QLD)

Because [P/D] [insert facts e.g. resides in place 2/ has head offices in place 2], [P/D] not present within the jurisdiction because the jurisdiction is [insert place 1]. Thus, TJ has not been acquired. [P] must therefore seek TJ via service upon [D].

## D submits to the Jurisdiction

...

## Valid Service Outside the Jurisdiction

**Red flag:** Where you have a defendant who is not in this state

### Service Interstate

The Court will need to have territorial jurisdiction in relation to the proceeding, one way this is achieved is valid service. An initiating process may be served on a person that is interstate such as [D] (who is in [**insert State**]) without leave of the court ([SEPA s 15\(1\)](#)). This will have the same effect and will give rise to the same proceedings as if it had been served in the place of issue ([SEPA s 12](#)).

...

## Service Overseas

The Court will need to have territorial jurisdiction in relation to the proceeding, one way this is achieved is valid service. The originating process can be served on the person in [COUNTRY] without leave of Court where it is in a category of proceedings closely linked with Australia (SCR 7.01). On these facts, [P] will want to rely on the fact that the:

1. relief is sought against a **person** who is **ordinarily resident in Vic** (SCR 7.01(1)(c))
2. proceeding is in relation to a **breach of contract** (SCR 7.01(1)(f)), and that (pick one)
  - the contract was made in Vic (SCR 7.01(1)(f)(i))
  - the contract made by or through an agent carrying on business or residing in Vic (SCR 7.01(1)(f)(ii)); OR
  - the contract governed by law of Vic (SCR 7.01(1)(f)(iii))
3. proceedings is in relation **breach of contract** and the **breach occurred in Vic** (SCR 7.01(1)(g))
4. proceeding is founded on a **tort committed in Victoria** (SCR 7.01(1)(i))
5. proceeding is in relation **damage suffered** (wholly or partly) in **Victoria**, and caused by a **tortious** act or omission (SCR 7.01(1)(j))
6. proceeding is being properly brought against a person duly served within or outside Vic, and another person outside Australia is a necessary or proper party to the proceeding (SCR 7.01(1)(l))

...

## Conclusion

[P] should seek to commence proceedings in the [insert Court], and [will certainly have/should seek] to serve [D] as soon as possible in order to gain territorial jurisdiction.

# Case Transfer

## Typical Qs:

1. Is [PERSON] likely to be successful in transferring the case?
2. How does Borderside make that application for the NSW Supreme Court to hear the case and is it likely to be successful? In your answer state your reasons [6 marks]

Under the Australian Cross-Vesting Acts, in certain circumstances, cases may be transferred between Courts

Mention if conditional appearance not yet given and [D] wants case heard elsewhere

Before applying for a case transfer, [D] must file and serving a conditional notice of appearance.

Introduction: Pursuant to JCCVA (pick one)

...s 5(1), [NAME] may apply for a case transfer from SCV to the Federal Court or the Family Court

...s 5(2), [NAME] may apply for a case transfer from SCV to Supreme Court of [STATE]

...s 5(3), [NAME] may apply for a case transfer from Supreme Court of [STATE] to SCV

...s 5(4), [NAME] may apply for a case transfer from the Federal Court / Family Court to SCV.

Option 1: Another proceeding is pending in another Court

Here, there is another proceeding pending in [insert Court 2 e.g. another Supreme Court]. Therefore, s5(X)(b)(i) requires consideration.

Option 2: Single proceeding - MOST COMMON

Here the proceeding is a **SINGLE PROCEEDING** ([P]'s proceeding against [D]). Thus, it need be determined whether, firstly, it would be **more appropriate** for the matter to be heard elsewhere (specifically, [insert Court 2]) having regard to the **factors (A)-(C) in s5(X)(b)(ii)**, OR secondly, whether it is otherwise in the **interests of justice** to do so (s5(X)(b)(iii)). SEE Q2

Note: For s 5(1), SCV = Court 1 and the Federal Court or the Family Court = Court 2



A transfer will be ordered under s5(X) JCCVA (pick one)

1. if there are **separate but related proceedings** pending in a different court (s5(X) (a) JCCVA) AND the Court considers it would be **more appropriate** for all the proceedings to be decided by the other Court (s5(X)(b)(i) JCCVA)
2. Where there is a **proceeding pending** and the Court considers
  - (i) it will be **more appropriate** for the matter to be **determined in another court** (s5(X)(b)(ii) JCCVA) AND
  - (ii) it would be otherwise in the **interest of justice** for the **proceeding to be determined in another court** (s5(X)(b)(iii) JCCVA).

## Q1. Is it more appropriate the proceeding be heard in [insert Court 2 e.g. another Supreme Court]? (s 5(X)(b)(i) JCCVA)

Yes—>The first court shall transfer the relevant proceeding to the second Court

No—>See Q2

### *William v TT-Line* ('more appropriate' factors)

Introduction: Whether it will be more appropriate, will involve considering the following connecting factors from *William v TT-Line*.

#### [Factor 1] Place where wrong occurred:

Here the [breach of contract / personal injury / tort] occurred in [insert state].

- *Where it is personal injury/tort*: Because this is a [personal injury/tort] claim 'significant weight' will be placed on the place of the wrong per *Williams* (at [8]).

#### [Factor 2] Residence of parties:

Here, [P] is a [resident / carries on business] in [insert state] and [D] is a [resident / carries on business] with respect to [company] in [insert state].

#### [Factor 3] Convenience of parties

Here, [insert state] appears to be the most convenient venue because this is where

- [P/D] resides / carries on business
- [P] is injured

and it will therefore be burdensome for them to travel. Any inconvenience in a party not physically attending may easily be rectified through use of remote hearing (like the video link for remote witnesses in *TT line* at [39]).

#### [Factor 4]: The law governing the proceeding

...

#### [Factor 5]: Experience of particular court

...

#### Conclusion - if discussing s 5(X)(b)(i) JCCVA (not having jumped from s 5(X)(b)(ii))

On balance, it [is/is not] more appropriate the proceeding be heard in [insert Court 2 e.g. another Supreme Court]

#### Q2. Is it more appropriate that the matter be heard elsewhere? (s 5(X)(b)(ii) JCCVA)

Yes—>Case should be transferred

No—>Case should NOT be transferred

Note: interests of justice is one of the factors considered in (ii)

In determining whether it be more appropriate for the case to be heard in [Court 2], the Court will consider the factors from *William v TT-Line* and must have regard to those factors in s5(2)(b)(ii)(A)-(C).

#### Option 1: Clear application of (A) and (B)

s5(2)(b)(ii)(A): It [can/cannot] be said 'the relevant proceeding would have been incapable of being instituted in' [First Courts' State e.g. Victoria]. In other words, the case [could not/could] have been heard in [First Courts' State e.g. Victoria].

s5(2)(b)(ii)(B): The facts [indicate/do not indicate] that the matters for determination involve the application of another law

- being [insert state]

- because it is clearly [**First Courts' State e.g. Victoria**]'s law.

Option 2: Unclear application of (A) and (B)

...

s5(2)(b)(ii)(C): I will consider below whether it is in the interests of justice that the matter be heard in [**insert Court 2**].

***William v TT-Line*** ('more appropriate' factors) — See Q1

**WRITE TO HAVE AS CONCLUSION AFTER Q1**: It is [**likely/unlikely**] that [D] would satisfy s5(2)(b)(ii)(C) —>See "overarching purpose" below

### Q3. Is it in the interests of justice that the proceeding be determined elsewhere? (s 5(X)(b)(iii) JCCVA)

[Yes/No]. In applying (b)(iii) the High Court held in *BHP Billiton* that ‘the interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered’. It is [likely / unlikely] that the Court will find that it is in the interests of justice because

- [D] is **well-resourced** (like the ‘well-resourced corporate defendant in *William* at [41]).

...

*Location of parties*

...

*Witnesses and evidence*

...

*Neutral:*

- There’s no real difference in ability to access legal representation on the facts that we’re given (*William*)

### Overarching Purpose

...

## Conclusion

On balance it is likely that the [Court 1] would

- consider it to be more appropriate or in the interest of justice to have the case heard in the [Court 2]
- reject the application for case transfer