

# MATTERS BEFORE PROCEEDINGS

## CAUSES OF ACTION & PARTIES

### WHAT IS A COA?

- A CoA means the set of facts that give someone the right to sue another person and get a legal remedy (*Letang v Cooper*).

### MULTIPLE COA AGAINST SOMEONE?

**RSC O 18 r 1** – Plf can inc multiple claims (causes of action) in one action against the same defendant IF:

- (a) SAME CAPACITY – plf & def are involved in same role for all claims (e.g. both as individuals)
- (b) ESTATE CASES – Def is sued partly as executor/administrator & partly personally – all relating to same estate.
- (c) COURT LEAVE – To obtain court permission, plf must apply BEFORE starting the case, in ex parte application, including affidavit explaining why permission is needed.

### WHO MUST BE A PARTY?

- **RSCO O 18 r 4(2)** – If 2 or more persons / companies share the same right / claim – they must ALL be included in the case.
- If someone won't agree to be a Plf they should be listed as DEFENDANT instead.

## JOINDER OF PARTIES

### MULTIPLE COA INVOLVING DIFFERENT PARTIES?

**RSC O 18 r 4** – Different parties can be joined to the case if:

- (a) All claims depend on the same issue / event (and if separate cases filed, there would be a common question of law / fact)
- (b) All rights / relief claimed come from the same transaction or series of transactions (e.g. same contract, same event, connected dealings).
- (c) The court gives permission / LEAVE to join them.
  - Joinder of parties must be AT THE START of the case (*Lois Nominees v Hill*) not adding new ones later.

### JOINT LIABILITIES MUST BE ADDED AS PARTIES TO THE CASE:

**RSC O 18 r 4(3)**

- *When 2 or more people share the same debt / legal obligation (i.e are jointly liable), they must be included in the case.*
- The court can STAY the case until all .....

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## JURISDICTION (CHOICE OF FORUM)

### WHAT DOES JURISDICTION MEAN?

*Jurisdiction means the authority of the court or tribunal to adjudicate on a dispute. However, there are various meanings to the term.*

- Per ***PT Garuda Indonesia v ACCC*** – Jurisdiction is a generic term used in a variety of senses, some relating to matters of geography, some to persons & procedures, others to constitutional & judicial structures & powers such as those sourced in Ch 3 of the Constitution.
- Per ***Lipohar v The Queen***, Jurisdiction may be used to (1) describe the amenability of a def to the court's writ and the geographical reach of that writ OR (2) to identify the subject matter of those actions entertained by a court OR (3) to locate a territorial or law area 12 or law district.
- In ***Kirk v Industrial Relations Commission of NSW***, the theory / concept of jurisdiction as authority to decide is often traced to **Lord Denman CJ judgement in *R v Bolton***.

### WHEN DOES A COURT HAVE JURISDICTION?

*No Australian Court has unlimited jurisdiction (***PT Garuda Indonesia v ACCC***). A court can only hear a matter where it has appropriate jurisdiction or authority to decide (***Kirk v Industrial Relations Commission NSW***).*

Courts can hear matters if they meet 2 conditions:

**SUBJECT MATTER JURISDICTION** – IF the case falls

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## ALTERNATIVE DISPUTE RESOLUTION AGREED UPON?

### ADR?

*Parties might consensually agree to resolve civil disputes outside of court:*

- E.g. through arbitration, expert opinion, or mediation or negotiation.

### Example arbitration clause:

1. Arbitration (Australian – only Contract)
  - (a) Any dispute, controversy or claim arising out of, relating to or in connection with this agreement, including any questions regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Australian Disputes Centre (ADC).
  - (b) The arbitration shall be conducted in [ SEAT / PLACE ] in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to ADC (the Rules).

### EXPERT DETERMINATION:

- Expert determination is increasingly used in commercial contracts for speed, informality, expertise, privacy & to preserve commercial relationships.
- Courts support giving effect to expert determination clauses & reluctant to strike them down for uncertainty or ‘ousting court jurisdiction’ (Straits Exploration v Murchison United).

### Example expert determination clause from **Straits Exploration v Murchison United:**

Process summary

1. Either party may refer a dispute to an independent expert.
2. If parties can't agree on expert? nominated by relevant professional body depending on dispute type (mining, accounting, finance, legal).

Expert acts as expert, not...

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## OFFERS OF COMPROMISE

Offers of compromise follows mediation or negotiation, can be made by written correspondence. Two main types include Calderbank Offer and Order 24A Offer.

### CALDERBANK OFFERS:

- **KEY FEATURES INCLUDE:**
  - Marked “without prejudice save as to costs”
  - Clear, precise, certain, capable of acceptance – no ambiguity.
  - Time for acceptance stated (usually 21-28 days).
  - State that rejection may lead to indemnity costs if UNREASONABLE rejection (Ford Motor v Lo Presti).
  - Provide reasons why offer should be accepted.
  
- **CONSEQUENCES OF REJECTION:** Court may award party-party costs (normal costs) and indemnity costs (actual costs) if rejection unreasonable.
  
- **FACTORS TO CONSIDER IF REJECTION UNREASONABLE:**
  - (1) Stage of proceedings (later = stronger case for unreasonable).
  - (2) Time allowed to consider offer (shorter = less unreasonable).
  - (3) Extent of compromise offered.
  - (4) Offeree's.....

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# COMMENCING PROCEEDINGS

## ORIGINATING PROCESS

### WHAT IS AN ORIGINATING PROCESS?

*An originating process is any document that commences legal proceedings, inc an application, statement of claim, originating summons, or cross-claim.*

### WASC – CAUSE / ACTION / MATTER

CAUSE	ACTION	MATTER
<ul style="list-style-type: none"> <li>- Action / suit / other original proceeding bw Plf &amp; Def &amp; any criminal proceeding (SCA s 4).</li> <li>- Inc proceedings w multiple parties.</li> </ul>	<ul style="list-style-type: none"> <li>- Any civil proceeding commenced by WRIT or other manner as prescribed by rules of court.</li> <li>- Excludes crim proceedings (SCA s4).</li> <li>- An action proceeds on pleadings, discovery, interrogatories, oral trial.</li> <li>- Involves factual issues.</li> </ul>	<ul style="list-style-type: none"> <li>- EVERY proceeding in Court, not a cause (s 4 SCA).</li> <li>- A proceeding that does not cover a dispute bw parties.</li> <li>- Relief not sought.</li> </ul>

### HOW TO COMMENCE CIVIL PROCEEDINGS?

*Every action must be commenced by writ (RSC O 4 r 1).*

- **CIVIL PROCEEDINGS HEARD IN CHAMBERS?** Commence proceedings by originating summons.
  - E.g. asking the court to interpret a will = originating summons.
- **OTHER CIVIL PROCEEDINGS** must be commenced by originating motion.
  - Usually statutory or procedural applications – judicial review, prerogative orders.
  - E.g. applying for an order under a statute = originating motion.

### ORIGINATING SUMMONS VERSUS ORIGINATING MOTION IN WASC

ORIGINATING SUMMONS O 58 r 1	ORIGINATING MOTION
<ul style="list-style-type: none"> <li>- Used to make INTERLOCUTORY APPLICATION</li> <li>- Made to judge in chambers O 58 r 1</li> <li>- <b>FORM 74 / 75</b> – O 58 r 14(1)</li> <li>- Pre-Action discovery</li> <li>- Interlocutory injunction</li> </ul>	<ul style="list-style-type: none"> <li>- Must be used if proceedings NOT action commenced by writ nor civil proceedings bw parties to be heard in chambers O 4 r 1(c)</li> <li>- Strike out pleading = originating motion.</li> <li>- Can be made orally</li> <li>- Less formal than OS</li> <li>- Must give notice of OM unless ex parte <b>FORM 64 (O 54 r 5)</b>.</li> <li>- Notice of motion must contain concise statement of nature of claim made or relief / remedy sought O 54 r 5(3).</li> </ul>

### FORM FOR COMMENCING PROCEEDINGS SEEKING SUBSTANTIVE RELIEF IN WASC?

- E.g. damages for breach of contract

- The writ for the commencement of an action in FORM 1 OR 2 (**O 5 r 1**).
- **FORM 1** = Writ of summons (General).

**FORM 2** = .....

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## **IN WHAT CIRCUMSTANCES WOULD SCWA MAKE ORDER FOR SUBSTITUTED SERVICE?**

*Generally, service must be effect in person (personal service) subject to O 72 RSC. Service is important because it is key for the court's jurisdiction in personam (Laurie; Gosper), meaning if the writ is not served it may be struck out for being stale (o 7 r 4). However, in circumstances that personal service would be impracticable, an order for substituted service may be made (o 72 r 4(1); Haymarket). Substituted service will be treated as equivalent to personal service for the purpose of establishing personal jurisdiction (Laurie). However.....*

## DEFAULT JUDGEMENT

### WHAT IS A DEFAULT JUDGEMENT?

A default judgement only applies to proceedings commenced by writ O 13 r1(1) and is entered against a def who fails to file an appearance within the prescribed time. The effect of the default is that the def is deemed to have admitted the facts alleged in the.....

### RELEVANT PROCEDURE:

- (1) Chamber summons.
- (2) Mem of conferral.
- (3) Affidavit in support – preferable direct evidence.
- (4) Minute of proposed orders – affidavit may contain info/belief, but direct ev preferred.

### REQUIREMENTS FOR APPLYING FOR DJ:

- (1) Must be filed AFTER expiry of appearance but BEFORE any appearance is filed by Defendant.
  - i.e if Def enters an appearance out of time the right to default judgement is lost.
- (2) Show proof of service of writ O 13 r1(3) by either:
  - (a) Affidavit of service duly endorsed under O 9 r 1(4) OR
  - (b) Sealed writ endorsed by def's solicitor (as accepting service).
- (3) Use appropriate form from sch 2 depending on what route in step 2 taken:
  - Form depends on nature of claim made in writ. If wrong form used, judgement is irregular and D has right to set aside judgement at Pf costs. Pf can choose NOT to enter a DJ and proceed to trial but at costs risk. WHY? Success at trial may bring public vindication – e.g. defamation – **Morse v Frost**.

### WHAT TYPE OF DEFAULT JUDGEMENT?

#### A – LIQUIDATED DEBT / SUM – FORM 32 – O 13 r 2:

- Applicable if writ claims a liquidated **SUM** only!!!
- P can enter for judgement **against any / all Ds** for an amount not exceeding claim and costs.
- LIQUIDATED SUM = specific amount objectively calculated, no opinion or assessment – ref to scale/formula:
  - Eg. loan repayment, statutory formula – **Alexander v AJAX**
- INTEREST can be claimed as liquidated sum - **Philips v Debrueys, s32 SCA**.

#### B – UNLIQUIDATED DAMAGES – FORM 33 O 13 r 3:

- **If ONLY claim in writ is for unliquidated damages, a judgement can be entered against any/all defs for damages to be assessed.**
  - i.e judgement is relevant only to liability, quantum subject to court assessment in subsequent proceedings.
- Plf must apply for directions for assessment of damages (w/ affidavit evidence) & **Def can contest the assessment.**

## C – OTHER CLAIMS

- Other claims than above are for COSTS ONLY!! O 13 r 10
- Detention of goods, land possession, mtg claims – FORMS 34-36C
- Multiple claims? Follow relevant rules.
- Alternative claims? Must elect one, abandon others (**Macquarie Bank**).

## SETTING ASIDE OR VARYING DEFAULT JUDGEMENT – O 13 r 14:

### A – REGULARLY ENTERED DEFAULT JUDGEMENT?

- I.e. where the DJ has been properly entered, the judgment complies w court rules, seeks the correct amount of relief, no issues with service (**RT Co v Minister State for Interior**).
- **There's no firm rules for setting aside**, the court must exercise discretion to do justice (**Hall; pilbara Infrastructure**).
- CONSIDERATIONS:
  - (1) **ARGUABLE DEFENCE?** Sufficient is D establishes its case is not inherently incredible & if accepted at trial wld have real prospect of success.
  - (2) **REASON FOR NON-APPEARANCE?** D failed to appear, must frankly outline reasons in affidavit (Hall).
  - (3) **DELAY IN APPLYING?.....**

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# GATHERING EVIDENCE / DISCOVERY

## DISCOVERY & INSPECTION

Discovery is the next step after pleadings have closed.

Two-stage process:

1. DISCOVERY – Disclosure of documents relevant to the case.
2. INSPECTION – Parties' right to examine & copy those docs.

## DISCOVERY:

**Definition:** Process where a party discloses documents relevant to issues in the case that are (or have been) in their **possession, custody, or power**.

**Key Points:**

- Main way to obtain documentary evidence.
- **Discovered documents ≠ automatically admissible** (*Wilson v Thornbury; Mann v Carnell*).
- Parties must disclose even if documents **indirectly relevant** (*Peruvian Guano; Atlas Copco*).

**Purpose:**

- Ensure fair trial and ascertain truth.
- Prevent trial by ambush (KNOW WHATS COMING)
- Encourage settlement (*Lampson v FMG*).

## A – APPLICATION FOR GENERAL DISCOVERY

- Party may request discovery of all “documents” in the **possession, custody, or power** of the other party relating to matters in question (O 26 r 1–7, O 24 r 4).
- Application can be **made anytime** & Discovery must generally be **provided within 10 days** (O 24 r 4), often via **court order specifying a date**.
- **DOCUMENT LIST:**  
**FORM 17**, verified by **affidavit FORM 18** (O 26 r 1(3), r 4(4)) **stating all reasonable inquiries have been made** (*Cazaly Iron; Absolute Analogue*).
  - *To discharge discovery obligations, a party must take REASONABLE INQUIRIES when seeking to discover a document.*

## B – BASIC PROCESS

- **ADVISE CLIENT OF DISCOVERY OBLIGATIONS** (*Con Ange v Fairfax*).
  - Explain discovery requirements to client (O 26 r 16A; *El Du Pont; Brookfield v Yevad*).
  - Warn **against destroying documents** (*British American*).

- CLIENT PROVIDES DOCS TO LAWYER:
  - Lawyer reviews for relevance & privilege.
- PREP DOC LIST & AFFIDAVIT:
  - Affidavit must confirm all reasonable inquiries made (**Cazaly Iron v Bowler**).
  - Doc list guidance under O 26 r 4(1) – could seek specific documents, categories, bundles. **SEE BELOW**
- FILE & SERVE ON OTHER PARTY
- INSPECTION BY OPPOSING PARTY
- ADMIN STAFF MAKE COPIES
- SUPPLEMENTARY DISCOVERY – if new docs arise.
- CONTINUOUS OBLIGATION – until trial O 26 r 2
  - Parties must preserve documents – destruction may lead to adverse orders (**British American**).

## C – SCOPE OF DISCOVERY:

### WHAT CAN BE DISCOVERED?

- Documents, discs, tapes, soundtracks, films, images, or *any record of information* (O 26 r 1A).
- Matters in issue are determined by reference to pleadings by docs are discoverable even though they're not directly relevant to issue.
  - Per **Peruvian Guano**, includes all documents that might advance or damage a party's own case.
  - Per **Atlas Copco**, includes.....

## FOUNDATIONS FOR CLAIM OF PRIVILEGE MUST BE SET OUT – O 26 r 12:

### General rule:

*Grounds of privilege must be set out clearly in the affidavit/discovery list.*

*Usually claimed by reference to a class of documents (e.g. confidential solicitor–client communications for legal advice).*

*Rules allow general description but still require enumeration and identification of each document.*

### 1. Mere assertion is insufficient – **Kennedy v Wallace**

*Simply asserting privilege or stating the purpose for which the document was created is not enough.*

*Affidavit must show why the document attracts privilege.....*

## HOW CAN PRIVILEGE BE WAIVED?

Privilege can be waived either expressly or by implication. Waiver occurs when the client's conduct is inconsistent with maintaining the confidentiality that privilege is intended to protect, not because of any general principle of fairness. This principle was stated in *Mann v Carnell* (1999), where the High Court held.....

## GATHERING EVIDENCE

### NOTICE TO PRODUCE:

- PURPOSE = To obtain immediate production of documents referred to in pleadings or affidavits.
- Rule = RSC Order 26 rule 8(2) – allows a party to request immediate production of documents mentioned in another party's pleadings or affidavits.

### WHAT IS THE VALUE OF A NOTICE TO PRODUCE?

*A notice to produce allows one party to require another to produce specified documents at trial or hearing under Order 30 rule 5(3). Order 30 rule 4(3) also deems a notice to produce to exist for any discovered documents identified in a list served under Order 26. The notice enables the issuing party to adduce secondary evidence about a document shown to be in the possession, custody, or power of the opponent, as established in Morgan v Babcock & Wilcox Ltd (1929). However, it does not compel production of the document; it merely allows secondary evidence to be given if production is refused. The notice will be ineffective if served.....*

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## SEARCH ORDERS

### SEARCH (ANTON PILLAR) ORDERS O 52B:

- Authorises search of the defendant's premises to preserve / secure evidence or property relevant to current or anticipated proceedings O 52B r 2.
- Can be sought before proceedings commenced (anticipatory remedy).
- Used when there's a real concern that the other party may destroy, hide or dispose of evidence.
- Usually made ex parte to avoid tipping off respondent CPD 9.6.2[4].
- Highly exceptional & intrusive remedy – strict conditions, strong proof required.

### CONDITIONS FOR GRANT – O 52B r 3:

*Court may only make the order if all three conditions are met:*

1. STRONG PRIMA FACIE CASE on an accrued cause of action.
2. SERIOUS POTENTIAL / ACTUAL LOSS/DAMAGE if order not made.

3. SUFFICIENT EVIDENCE that:

- (a) Respondent possesses IMPORTANT EVIDENTIARY MATERIAL &
- (b) There is a REAL POSSIBILITY the respondent may DESTROY OR HIDE that material.

**CFC Consolidated v Cooper** – failed because no stronger case, no serious loss, no real destruction risk.

## WHAT NEEDS TO BE FILED – O 52B + CPD 9.6.2

DOCUMENTS REQUIRED	CONTENTS OF SUPPORTING AFFIDAVIT CPD 9.6.2[8]
<p><b>1. APPLICATION (Motions or summons).</b> If ex parte, strict duty of full &amp; frank disclosure <b>CPD 9.6.2[20]; Bullock.</b></p>	<p>Must include:</p> <ul style="list-style-type: none"><li>(a) Description of items / cats to be searched or secured</li><li>(b) Address / location of premises (residential or buz)</li><li>(c) Reasons for order – evidence risk or likely destruction</li><li>(d) Prejudice or loss likely if not made</li><li>(e) Details of independent solicitor (name, firm, litigation experience, consent).</li><li>(f) Vulnerability of occupants (if residential): female, child &lt;18, person w disability, limited English, or other vulnerability.</li></ul>
<p><b>2. SUPPORTING AFFIDAVITS</b> – <i>see to right for detail.</i></p>	
<p><b>3. MINUTE OF PROPOSED ORDERS</b> Standard template CPD 9.6.2.1 (can be tailored to case). May inc terms for IT experts or supervision arrangements.</p>	

### ROLE OF INDEPENDENT SOLICITOR:

- Central safeguard against abuse of power
- Must supervise execution of search, serve the order, report to court
- Cannot be.....

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## APPEALS

### GENERAL PRINCIPLES:

- *No right to appeal at common law – statutory right only: SCA Div 6 s58.*
- Appeals generally on questions of law; merits appeal is normally not permitted.
- WASCA composition: Chief Justice, President, other appointed judges.
- Hearing: usually 3 judges.
- Can sit alone on procedural matters.
- 5 judges required to overturn well-established precedents.

### STEP 1: WHICH KIND OF APPEAL?

#### 1 – APPEAL DE NOVO:

- Rare; matter heard afresh on new evidence, without regard to original decision.
- No need to demonstrate error in original decision.
- Less common: avoids system flooding.
- Examples:
  - ✓ Appeal from decision of DC registrar to a judge under r15 DCR.
  - ✓ Appeal from WASCA registrar procedural decision to judge r16.

## 2 – APPEAL BY RE-HEARING:

- Provided for by statute; generally applies to SC. Court of Appeal Rules 2005 (WA) r25.
- *Appellant must show primary judge made an error of law, fact, or both.*
  - \*\*\*Error must be material: could or would affect the result.
- Applying law at time of appeal & evidence you led at trial: **Coulton v Holcombe**.
- Test: Would the error affect the outcome?
- Cf. ruling some evidence inadmissible but would not change result.

## MUST SHOW ERROR OF FACT:

- Court cautious overturning findings of fact: interfere only if findings:
  - Demonstrated wrong by incontrovertible facts / uncontested testimony.
  - Glaringly improbable.
  - Contrary to compelling inferences (**Fox v Percy; Robinson Helicopter**).
- Particular caution on credibility findings – trial judge best placed.
- Inferences from undisputed facts: appellate court more readily interferes – **Warren v Coombs**.
- Inference must be unreasonable to overturn – **Min for Immigration v Hamsher; Lee v Lee**.

## CRITICAL LIMITATIONS:

- Party cannot rely on evidence not before the trial judge.
- Party cannot present a different case from trial case.
- **Coulton; University of Wollongong**.

## STEP 2: APPEALING FOR ADDITIONAL EVIDENCE

- Ordinary starting point: confined to evidence given at trial.
- Discretion to admit additional evidence: **CAR r47(3)(d); guided by common law – Gonin**.
- CATEGORIES:
  - (1) FRESH EVIDENCE: not reasonably available or discoverable at trial.
  - (2) NEW EVIDENCE: available but not adduced at trial.
    - Fresh evidence easier to admit than new.

- Heavy onus on party seeking additional evidence: **CDJ v VAJ; Saunders v Public Trustee.**

- **THE COURT WILL CONSIDER:**

- Public interest in finality.
- Availability at trial through due diligence – **Water Board.**
- Does evidence go beyond pleaded case?
- Strength of new evidence.
- Is evidence contested? Would it lead to new trial?
- Would evidence lead to different result?

## STEP 2: APPEALING FOR ADDITIONAL **ISSUES**

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