

OPEN-BOOK SETUP FOR THE EXAM ROOM

THIS VERSION IS BUILT FOR ONE PASS

- Read in this order: (1) this setup section, (2) MASTER EXAM ORDER, (3) FAST PROBLEM SKELETONS, (4) the topic sections, (5) the OPEN-BOOK CASE BANK.
- On your first and only full read, mark only three things in the margin: the governing rule, the lead authority, and any statute or rule that displaces the common law.
- Do not over-highlight. The point of this version is speed in the exam, not pretty colour.
- If the question is mixed, begin with MASTER EXAM ORDER (p 4) and then jump to the specific topic tab.
- If you get stuck on authority, go straight to CORE AUTHORITIES (p 29) or the OPEN-BOOK CASE BANK (p 34).

TAB PLAN FOR YOUR HARD COPY

- TAB 1 - Master exam order / issue spotting - p 4
- TAB 2 - Jurisdiction - p 6
- TAB 3 - Substance / procedure / proof of foreign law - p 11
- TAB 4 - Exclusionary doctrines / forum public policy - p 14
- TAB 5 - Choice of law in contract - p 16
- TAB 6 - Choice of law in tort - p 20
- TAB 7 - Governmental seizure of property / expropriation - p 25
- TAB 8 - Fast problem skeletons - p 27
- TAB 9 - Core authorities to know cold - p 29
- TAB 10 - Open-book case bank - p 34
- TAB 11 - Sentence starters / answer templates - p 40

FACT TRIGGERS -> WHERE TO TURN

- Served in NSW, fleeting presence, corporate presence, service out, EFJC, forum non conveniens, anti-suit injunction -> JURISDICTION (p 6).
- Limitation, damages, characterisation, pleading and proof of foreign law, expert evidence, presumption of similarity -> SUBSTANCE / PROCEDURE / PROOF (p 11).
- Tax, penalties, public laws, foreign governmental interests, gross injustice, forum public policy -> EXCLUSIONARY DOCTRINES (p 14).
- Governing law clause, proper law, capacity, formation, foreign illegality, duress, performance, discharge, contract damages -> CONTRACT (p 16).
- Overseas injury, ship, aircraft, high seas, New Zealand accident compensation, renvoi, concurrent contract/tort -> TORT (p 20).
- Foreign state seizure, confiscation, title to property, lex situs, act of state, recognition of foreign government -> EXPROPRIATION (p 25).
- Need a quick answer structure -> FAST PROBLEM SKELETONS (p 27).

WHAT THE MARCH 2025 PAPER SHOWS

- All topics can be combined in the same paper.
- A single problem can move from jurisdiction to tort to limitation to proof of foreign law.
- Another question can combine contract, exclusionary doctrines, and expropriation in the same answer.
- The distinction feature identified by the examiner was detailed authority-based analysis rather than bare conclusion.

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- 1. SCOPE OF CONFLICT OF LAWS
- 2. JURISDICTION
- 3. SUBSTANCE AND PROCEDURE + PROOF OF FOREIGN LAW
- 4. EXCLUSIONARY DOCTRINES + FORUM PUBLIC POLICY
- 5. CHOICE OF LAW IN CONTRACT
- 6. CHOICE OF LAW IN TORT
- 7. GOVERNMENTAL SEIZURE OF PROPERTY (EXPROPRIATION)
- 8. FAST PROBLEM SKELETONS
- 9. REVISION QUESTION MAP FROM THE SUBJECT GUIDE
- 10. CORE AUTHORITIES TO KNOW COLD
- 11. FINAL EXAM WARNINGS
- 12. APPENDIX C - OPEN-BOOK CASE BANK
- 13. APPENDIX D - SENTENCE STARTERS / ANSWER TEMPLATES
- 14. APPENDIX E - KEY STATUTES / RULES TO FLAG

WHY THESE NOTES MATTER

- **March 2025 examiner message:** all topics are examinable, not just tort and jurisdiction.
- Distinction standard answers were marked by depth of analysis and detailed discussion of the relevant cases and statutes.
- These notes therefore do 3 things at once:
 - give you black-letter rules;
 - show you the order in which to answer problem questions; and
 - tie each topic back to the prescribed authorities.

HOW TO USE THESE NOTES

- Read the Subject Guide case list beside these notes. Treat the starred/basic reading cases as non-negotiable.
- For each topic, know:
 - the governing rule;
 - the leading case or statute;
 - one factual example; and
 - one limit, exception, or contrast point.
- In problem questions, always separate:
 - jurisdiction;
 - choice of law;
 - substance vs procedure;
 - proof of foreign law; and
 - any public policy / exclusionary doctrine point.
- If both contract and tort are available, say so. Concurrent liability is a recurring examiner favourite.
- If New Zealand appears in the facts, immediately think about:
 - the Accident Compensation Act;
 - the Trans-Tasman Proceedings Act;
 - proof of New Zealand legislation; and
 - whether the special trans-Tasman forum rules apply.
- If a ship or aircraft appears, slow down and apply the special maritime / aerial rules before doing anything else.
- If a foreign government, tax claim, confiscation, wartime decree, or sovereign act appears, move straight to the exclusionary doctrines / expropriation topics.

MARCH 2025 EXAMINER TAKEAWAYS

- The March 2025 examination had two questions.
- Question 1 was a multi-issue problem focused on jurisdiction, substance and procedure, proof of foreign law, and choice of law in tort.
- Question 2 required comment and application in relation to choice of law in contract, exclusionary doctrines, and governmental seizure of property.
- **The practical lesson is obvious:** the examiner is comfortable combining topics and making you move between them.
- Do not study in silos.

MASTER EXAM ORDER FOR ANY CONFLICT QUESTION

- **Step 1:** Identify the forum.
 - Usually this will be the Supreme Court of New South Wales.
- **Step 2:** Identify the foreign element.
 - Foreign place?
 - Foreign defendant?
 - Foreign proper law clause?
 - Foreign government act?
 - Another Australian state or territory?
- **Step 3:** Identify the cause(s) of action.
 - Tort?
 - Contract?
 - Statutory claim?
 - Property / title issue?
- **Step 4:** Ask whether the defendant is subject to NSW jurisdiction.
- **Step 5:** Ask whether the court should nevertheless decline to exercise jurisdiction.
 - Exclusive foreign jurisdiction clause?
 - Forum non conveniens?
- **Step 6:** Identify the applicable substantive law.

- Tort - lex loci delicti.
- Contract - proper law.
- Property / expropriation - lex situs.
- Procedure - lex fori.
- **Step 7:** Check whether any forum statute displaces the common law rule.
- **Step 8:** Characterise doubtful issues as substantive or procedural.
- **Step 9:** If foreign law matters, ask whether it has been pleaded and proved.
- **Step 10:** Check for exclusionary doctrines or forum public policy.
- **Step 11:** Conclude on outcome and relief.

CORE TERMINOLOGY YOU MUST BE ABLE TO USE CLEANLY

- Forum / lex fori - the law of the place where the court sits.
- Lex loci delicti - the law of the place where the tort was committed.
- Proper law of the contract - the legal system governing most substantive contractual issues.
- Lex situs - the law of the place where property was situated at the time of the relevant transfer or seizure.
- Lex causae - the substantive law selected by the forum's choice of law rules.
- Lex loci contractus - the law of the place where the contract was made.
- Lex loci solutionis - the law of the place of performance.
- Renvoi - the reference by the forum to the whole law of the foreign system, including its conflict rules.
- Double actionability - the old Phillips v Eyre requirement that the wrong be actionable in the forum and not justifiable in the place of the tort.
- EFJC - exclusive foreign jurisdiction clause.
- Forum non conveniens - in Australia, the question is whether the local forum is clearly inappropriate.

1. SCOPE OF CONFLICT OF LAWS

TAB LABEL: SCOPE / BASICS. Trigger facts: foreign element, law area, basic choice of law rules, why foreign law can apply. Conflict of laws (private international law) is the part of Australian law concerned with private law questions containing a foreign element.

WHAT COUNTS AS A FOREIGN ELEMENT?

- A fact connected with a country outside Australia.
- A fact connected with another Australian state or territory.
- A party resident, domiciled, incorporated, or carrying on business elsewhere.
- A contract governed by foreign law.
- A tort committed elsewhere.
- Property situated elsewhere.

COUNTRY OR LAW AREA

- In conflict of laws, a "country" means a law area with its own private law system.
- It does not have to be a sovereign state in the public international law sense.
- Examples:
 - France;
 - Singapore;
 - New York State;
 - British Columbia;
 - New South Wales;
 - Victoria.

THE TWO PERSISTENT QUESTIONS

- Jurisdiction - is the defendant amenable to the power of the court, and should the court exercise that power?
- Choice of law - what legal system governs the substantive issue?

BASIC CHOICE OF LAW RULES TO KEEP IN YOUR HEAD ALL EXAM

- Procedure is governed by the lex fori.
- Tort is governed by the lex loci delicti.
- Contract is governed by the proper law.
- Property questions, including expropriation, are generally governed by the lex situs.

INTERNATIONAL VS INTRANATIONAL CONFLICT OF LAWS

- International conflict of laws:
 - the matter connects NSW with a place outside Australia.
- Intranational conflict of laws:
 - the matter connects NSW with another Australian state or territory.
- The distinction matters because:
 - forum public policy plays no role in intranational torts after Pfeiffer;
 - s 118 of the Constitution matters;
 - uniform statutory regimes sometimes apply within Australia and with New Zealand.

CONFLICT OF LAWS VS PUBLIC INTERNATIONAL LAW

- Conflict of laws is part of municipal law.
- Public international law regulates relations between sovereign states.
- The two interact where forum public policy draws on public international law, especially in expropriation and human rights cases.

TRANSBORDER CASE STUDIES YOU SHOULD BE ABLE TO TALK ABOUT IMMEDIATELY

Oceanic Sun Line v Fay

- Use for:
 - scope of the subject;
 - formation / consensus ad idem by lex fori;
 - whether a ticket clause is part of a contract;
 - forum non conveniens;
 - service out in tort damage suffered in NSW.

Venter v Ilona MY

- Use for:
 - the death at sea scenario;
 - lex fori deciding whether an EFJC is part of the contract;
 - strong bias in favour of enforcing commercial EFJCs;
 - overlap between contract, tort, jurisdiction, and maritime issues.

2. JURISDICTION

TAB LABEL: JURISDICTION. Trigger facts: presence, submission, service out, exclusive foreign jurisdiction clauses, forum non conveniens, anti-suit injunctions.

Start every jurisdiction answer with two distinct questions:

- Is there a basis for NSW jurisdiction?
- If yes, is there any discretionary reason not to exercise it?

JURISDICTION CHECKLIST

- Basis 1 - common law presence?
- Basis 2 - voluntary submission?
- Basis 3 - statutory service out?
- Then:
 - exclusive foreign jurisdiction clause?
 - clearly inappropriate forum?
 - anti-suit injunction issue?

A. COMMON LAW JURISDICTION - DEFENDANT'S PRESENCE

Individuals

- **Rule:** A defendant served with originating process while physically present within the territory of the court is subject to common law jurisdiction.
- Gosper v Sawyer confirms the territorial basis.
- Presence can be fleeting.

- HRH Maharanee of Baroda v Wildenstein:
 - service during a brief visit was enough.
- Laurie v Carroll is critical on timing.
- Laurie rules to know:
 - presence before issue of process is not enough by itself;
 - the primary basis is service while present in the territory;
 - if the defendant leaves after issue of process knowing of the writ, or with intent to evade service, jurisdiction may still be upheld.
- Joye v Sheahan applies the evasion principle in federal jurisdiction.

Corporations

- **Rule:** A corporation is present if it is carrying on business in NSW at a physical place of business for a sufficiently substantial period.
- National Commercial Bank v Wimborne is the key authority.
- Practical points:
 - not every commercial connection is enough;
 - physical presence matters;
 - sustained business activity matters;
 - an authorised agent and a fixed place of business help.

B. COMMON LAW JURISDICTION - VOLUNTARY SUBMISSION

What counts as submission?

- Filing an appearance.
- Filing a defence on the merits.
- Taking a step inconsistent with maintaining a jurisdictional objection.
- Contesting the merits before first pressing a jurisdiction objection.
- The Messiniaki Tolmi - application to strike out part of the claim amounted to submission.
- Vertzyas v Singapore Airlines - fighting the merits before the jurisdiction issue led to submission.

What does NOT count as submission?

- A proper objection under UCPR r 12.11.
- **Rule:** an application under r 12.11 to set aside service, challenge jurisdiction, or ask the court to decline jurisdiction is not submission.

Submission to cross-claims and amendments

- Marlborough Harbour Board v Charter Travel:
 - if the plaintiff sues in NSW, that can amount to submission to a sufficiently connected cross-claim.
 - the submission can extend to amendments arising from the same subject matter.

Submission by agreement

- Dunbee v Gilman:
 - an express choice of law clause is not, by itself, a submission to the courts of that legal system.
 - if parties want contractual submission, it must be express.

C. STATUTORY SERVICE OUT OF THE JURISDICTION

Quick map

- Defendant in another Australian state or territory:
 - Service and Execution of Process Act 1992 (Cth) s 15(1).
- Defendant in New Zealand:
 - Trans-Tasman Proceedings Act 2010 (Cth) s 9.
- Defendant outside Australia (other than New Zealand):
 - UCPR rr 11.1, 11.3, 11.4, 11.5, 11.6, 11.8AA and Schedule 6.

General NSW service out points

- **Rule:** No prior leave is required if the case falls within Schedule 6.
- Agar v Hyde:
 - the plaintiff must still show the claim falls within the rule;