07 Matters Preceding Litigation and Commencing Proceedings

(1) Is there a reasonable prospect of success?

Sched. 2 LPULAA 2014 places an obligation on legal representatives to require a lawyer to certify before filing, that there are reasonable grounds for believing, based on provable facts & reasonably arguable view of the law that the claim/defence has "reasonable prospects of success".

(2) WHERE: Which jurisdiction to bring the claim in?

P must consider if the court has jurisdiction to hear the case. Otherwise, court has no power to intervene in the dispute. 2 types:

1. *Subject matter jurisdiction:* consider **nature** of dispute eg. common law, equity or cth/state legislation, **amount** in dispute ie. $ value – note jurisdictional limits of each court, **parties** being sued.
    a. **Supreme Court:** unlimited civil jurisdiction – can hear all matters that are not within the exclusive jurisdiction of the Federal Courts: s 23 *SCA Act 1970.*
        i. Common Law Division: civil (>$750,000 claimed), criminal and administrative law matters; Equity Division: commercial law, corporations law, equity, trusts, probate and matters pursuant to family provisions legislation.
        ii. Appellate divisions – Court of Appeal (appeals arising from civil matters from the SC or lower court), Court of Criminal Appeal.
    - Land and Environment Court: same status as SC; vested with power to determine environmental, development, building and planning disputes.
    b. **District Court:** jurisdictional limit of $1,250,000: s 4(1) *DCA 1973* – can deal with cases involving larger amounts if parties agree; unlimited jurisdiction in claims for damages for personal injuries arising out of a motor vehicle accident or work injury.
    c. **Local Court:** jurisdictional limit of $100,000: s 29 *LCA Act 1970*.
        i. Small Claims Division: up to $20,000: s 1(a).
        ii. General Division: between $20,000 to $100,000: s 1(b).
        iii. Limit of $60,000 for personal injury or death claims: s 2.
2. *Territorial jurisdiction* (ie. jurisdiction *in personam*): choice of country, federal vs state/territorial courts, different courts within state hierarchy ie. local vs supreme courts.
    - *Laurie v Carrol*: D has to be, however transient and for whatever reason, served while in the state to be subject to a state court's jurisdiction. Substituted service cannot occur if D is not present in the state.
        - *Service and Execution Process Act 1992* (Cth) now governs service and gives state courts the power to serve D outside their state. In NSW, UCPR r10.13 provides for service Australia-wide.

Jurisdictional cross-vesting: what if the claim concerned breaches of both *federal* and *state* legislation or common law? In the past, P filed in 2 separate courts → duplication, wasted resources. Solution: cross-vesting scheme – legislation authorises transfer of matters to another court → *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) – s 4 vests jurisdiction in "State matters" on the SC of another state/territory.

- *BHP Billiton v Schultz* [proceedings commenced in NSW Dust Diseases Tribunal were transferred to SA ie. place of substantive law/place of plaintiff's residence/place where injury occurred. Held that in the interests of justice, the case should be transferred to SA Supreme Court.]: <u>test of whether cross-vesting can occur = necessary + in the interests of justice of both sides (s 5).</u>
    - Determining the interests of justice is a practical "nuts and bolts" management decision as to which court, in the pursuit of justice, is the more appropriate court to determine the substantive dispute (not necessary that one is 'clearly inappropriate').
    - Relevant factors considered when assessing 'interests of justice': (1) interests of both parties, (2) costs, expense and convenience, (3) *grounded in reality* ie. if P was close to death, moving to a new court would expedite the hearing.
    - Court may consider place(s) where parties and/or witnesses reside/carry out business, location of subject matter, importance of local knowledge in dispute resolution, law governing relevant transactions, available procedures in each court, hearing dates, whether it is sought to transfer the proceedings to a specialised court eg. Family Court.

(3) WHEN: Are you within the limitation period (ie. time period within which P must commence legal action)?

Limitation periods are *substantive law (not procedural):* rules which are directed to governing or regulating the mode or conduct of court proceedings; are procedural, everything else is substantive (McKain, Mason CJ). They affect the existence and enforceability of rights/duties of parties → substantive (*John Pfeiffer v Rogerson*).

- Rationale: Evidence lost, Fairness to a defendant, Certainty and stability eg. insurers, businesses, public institutions can organise resources knowing that liability brought to an end at end of a certain period, Contrary to public interest in bringing just, quick and efficient proceedings.

Discoverability **Specific limitation periods – Limitation Act 1969 (NSW).**

s 50D(1) ... a cause of action is 'discoverable' by a person on the first date that the person knows or ought to know of each of the following facts:
(a) the fact that the injury ... has occurred,
(b) the fact that the injury ... was caused by the fault of the defendant,
(c) ... the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.
S 50D(2) A person 'ought to know' of a fact at a particular time if the fact would have been ascertained by the person had the person taken all reasonable steps before that time to ascertain the fact
(see *Baker Morrison v NSW*)
s 50D(3) In determining what a person knows or ought to have known, a court may have regard to the conduct and statements, oral or in writing, of the person.

Cause of Action	
Consumer Claim	6yrs from date of breach: ss 236(2) and 237(3) *AU Consumer Law*
Contract	6yrs from date of breach: s 14(1)(a)
Tort (general)	6yrs from date of breach: s 14(1)(b)
Breach of trust	6yrs from date of breach: s 48
Defamation	1yr from date of publication of matter complained of: s 14B
Land recovery	12yrs from date cause of action accrues: s 27(2)
Tort (personal injury)	3yrs from date CoA is *discoverable* by P, OR 12yrs from the act /omission alleged, *whichever is the first to expire:* s 50C.

- *'date on which cause of action first accrues'* ie. date of breach = cause of action accrues once P is able to issue a statement of claim capable of stating every existing fact which is necessary for the P to prove to support his/her right to judgement (*Do Como v Ford Excavations*).
  - Discoverability (requires knowledge of facts) v Accrual (CoA may accrue without P's knoweldge)
  - Knows (subjective); ought to know (objective) ie. when a reasonable person in claimant's position should have made the discovery.

1. *Baker-Morisson v NSW* [Toddler injured at police station when hand caught in automatic sliding doors on 26 May 2004. Mother (as natural guardian of the child) sought legal advice within one week – SoC issued 3 yrs 26 days after the accident and D moved to strike out application on the grounds that claim was statute-barred. Johnsteon DCJ struck out SoC and dismissed proceedings as mother 'knew or ought to have known' each of the matters set out in s 50D(1) such that the CoA wass discoverable on or about 1 June 2004].
   - Issue: did D have *constructive knowledge* of s 50D facts within the 26 days of injury occuring?
   a. **s 50(1)(a): knowledge of injury – must be actual and constructive**
      i. s 50D(2): constructive – "ought to know" measured against someone who has taken all reasonable steps before that particular time to ascertain the fact.
      ii. No dispute that the mother knew the physical injury had occured. Court notes obiter that additional qustions posed by a psychological injury eg. must a nonprofessional be able to identify a recognised psychiatric illness from emotional distress as required uner the s 33 *Civil Liability Act*?
   b. **s 50(1)(b): knowledge of injury caused by the fault of D** – contentious. Without knowledge of the availability and reasonable practicability of insulation of a safety device or protective guard, she could not be said to be aware or that someone in her position or to have been aware that the injury was caused by the failure on the state to take reasonable care for the daughter's safety.
   c. **s 50(1)(c): was the injury sufficiently serious to justify the bringing of an action on the cause of action?**
      i. Mother must know injury is both serious and meets the statutory thresholds of minimum 15% of the whole of the person. That requires legal evaluative judgment and medical expertise. P's expert said 16%, State said 1%. Not necessarily conclusive.
      ii. Absent expert advice, it cannot be said that mother could hold the opinion that CoA serious enough to justify commencing proceedings within 26 days of injury or that a reasonable person in her position ought to know.
      iii. Also, lawyers can't initiate claim if no reasonable prospects of success – mother was dependent on that advice.
2. *Baggs v USU* – affirming *Baker-Morisson* [21 May 2003: B fell down stairs of Wentworth (owned by UoS but occupied by USU) during fire drill. B consulted lawyer who wrote to UoS to determine who D was, before advising B to lodge workers' comp claim as a UoS employeee – which he did on 26 May 2003. In Jan 2010, B got lawyer to lodge negligence claim against UoS, but on 31 Mar 2010, UoS said it was owner not occupier. B did not know injury was caused by the fault of USU until 31 Mar 2010; B commenced proceedings against USU on 28 April 2011. Trial judge erred in finding agaisnt B]
   - Issue: should B ought to have known?
   a. B did not know the difference between USU and UoS – believed both were owners.
   b. Advice received by B was that UoS was the owner of the building and the entity responsible for its care and control and that she could not pursue a common law claim against UoS. B thus did not instruct solicitor to pursue a claim for work injury damages against UoS.
   c. **s 50D(2): D could not show that the "taking of all reasonable steps" required B before June 2005 to seek advice from a second firm of solicitors in relation to a matter on which she had already received a written opinion.**

- Limitation periods in **conflict**: In NSW, if more than one cause of action is pleaded, the applicable limitation period is the earliest (Limitation Act 1969 s 13; *Brisbane South Regional Health Auth v Taylor*).
- **Defamation** – used to be that every communication of defamatory matter created a separate CoA with LP running for each; s 14C now creates a 'single publication' rule providing that the LP for <u>subsequent publication of similar matter by the same publisher/associate will run from the time of first publication.</u>
- Scope for **extending** limitation periods
  - **Postponement** – (a) Fraud, deceit, concealment or mistake: s 55-56 (LANSW) – *Hawkins v Clayton*: where the wrongful conduct of the defendant has the effect of preventing the institution of proceedings against the defendant, the commencement of the limitation period is suspended for as long as that prevention continues; (b) Written and signed acknowledgement or part payment by the defendant - s 54 (LANSW): limitation period is calculated from the date of confirmation or acknowledgement of a CoA.
  - Effect of **disability** on limitation period: s 50F – (1) If a person has a cause of action for which a limitation period has commenced to run and the person is under a disability, the running of the limitation period is suspended for the

duration of the disability; (2) A person is "under a disability" while the person: a) is a **minor**, but not while the minor has a **capable parent or guardian**, or b) is an **incapacitated** person for a **continuous period of 28 days or more**, but not while the person is a **protected** person….

- "incapacitated person": person who is incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of: a) any **disease** or any **impairment** of his or her physical or mental condition, or b) **restraint** of his or her person, lawful or unlawful, including detention or custody under the Mental Health Act 1990, or c) **war** or warlike operations.
- NB: Section 6A (LANSW): for survivors of child abuse and child sexual abuse, limitation periods have been **removed** in NSW. This covers both physical and sexual abuse.

<u>(4) Do any court orders need to be sought in the pre-trial period to preserve evidence?</u>

Interlocutory procedures are broadly split into 2 types:

1. Orders that <u>do not make final determinations</u> in respect of the rights/obligations of parties but are consequential to the management of the litigation eg. substituted Service, amendment of pleadings, discovery or request for medical examinations.
    a. Procedural, not substantive law.
    b. Commenced by a notice of motion, summons or application in a case or sometimes during a directions hearing.
    c. Applications can be made ex parte where there is no respondent, where: there is a particular urgency that warrants the dispensation of notice to the other party, notice might thwart the making of the application or notice might allow Dt to destroy evidence.
2. Orders designed to <u>preserve the status quo pending the hearing and final determination of the matter,</u> and to ensure that court processes are not being abused and, where possible, that any judgmental order resulting from trial is impossible e.g. injunctions, search orders, freezing orders and security for costs → **Preservation Orders.**
    a. **Injunctions** (UCPR r25.2(1)(c)): power to maintain the status quo pending resolution of substantive proceedings ie. before proceedings commence. Supreme and Federal Courts have inherent jurisdiction and statutory power to grant interlocutory/interim injunctions (NSWSC Act s 66(4); FCA Act s 23).
        i. *ABC v O'Neill* [O obtained an injunction preventing ABC from airing a documentary implying that O was involved in the disappearance of 3 kids who went to the beach one day and never returned. O was serving life sentence for murdering a child and had been charged with another murder of a 9yo child during this time. There was an interlocutory PERMANENT injunction restraining the ABC from broadcasting or otherwise publishing any part of a documentary known as "The Fisherman" on the grounds of raising an action for defamation. HCA granted the appeal and set aside injunction.]
            1. While no doubt that if publication occurred, O could have had an actionable defamation claim, only **nominal** damages might be awarded if publication was found to involve actional defamation, so the balance of convenience did not favour the grant of an injunction, but favoured denial of interlocutory relief.
            2. **Requirements for injunction** (Gummow & Hayne JJ) – applicant must show:
                a. Prima facie case: show that P has sufficient likelihood of success to justify preservation of status quo pending trial. Depends on the <u>nature</u> of rights asserted by P, and the <u>practical consequences</u> likely to flow from the order sought.
                b. Balance of convenience: whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.
                c. UCPR r 25.8 'usual undertaking as to damages' – agree to submit to any order the court considers to be just for the payment of compensation to anyone affected by the operation of the injunction.
    b. **Search orders** ie. *Anton Piller* orders
        i. UCPR r25.19 The court may make an order in any proceeding or in anticipation of any proceeding in the court, with or without notice (*ex parte* proceedings) to the respondent, for the purpose of **securing or preserving evidence** and **requiring a respondent to permit persons to enter premises** for the purpose of securing the preservation of evidence which **is or may be relevant to an issue in the proceeding or anticipated proceeding.**
            1. *Findex c McKay* [applicants applied to the court for unrestricted access to inspect the documents to see **whether** they had a CoA against D – order was refused]*:* SOs can only be used to secure/preserve evidence, not provide discovery, whether at preliminary stage or in the course of proceedings (UCPR r25.19).
                a. This appeared to be an opportunistic form of fishing expedition, seen to be available because the documents to be reviewed were available.
                b. To allow SOs to be used for investigatory purposes 'would erode the importance attached by the common law to protecting the privacy of individuals and the constraints otherwise imposed by the rules governing discovery.'
                c. SOs must not be used as a substitute for discovery. Search orders merely preserve the documents so that when an application for discovery is granted, the documents are available and have not been destroyed.

    ii. UCPR r25.20 The court may make a search order if the court is satisfied that: a) an applicant seeking the order has a **strong prima facie case** on an accrued cause of action, and b) the **potential or actual loss or damage** to the applicant will be **serious** if the search order is not made, and c) there is **sufficient evidence** in relation to a respondent that: i. the respondent **possesses important evidentiary material,** and ii. there is a **real possibility** that the respondent might **destroy** such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the court.
    iii. UCPR r25.22 Terms of Search order: permit/arrange to permit persons to enter premises and **search for, inspect, copy and remove** things described in the search order
    iv. UCPR r25.23 Court must appoint 'independent solicitors' to supervise search orders.
c. **Freezing orders** ie. *Mareva* orders: an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets (UCPR r25.11(2)); can be made against 3rd parties.
    i. *Jackson v Sterling Industries* [P sued D for breach – D was ordered to provide $3m security, which was in excess of D's actual assets. D appealed – held that the order went <u>beyond what was permissible because it was an order for security → D should not have been made to pay security to court.]</u>
        1. The **purpose** of a freezing order is **not** to create security for P as a condition of being allowed to mount a defence OR introduce a new vulnerability to imprisonment for debt/allged indebtedness, BUT to prevent D from disposing of their actual assets in order to frustrate/inhibit court processes by sseking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied (UCPR r25.11(2)) ie. depriving P of the fruits of any judgment.
        2. Here, the $3m payment was not merely the preservation of assets pending judgement, but required payment of what *he didn't have* – not preservation of what he already has. The orders also did not specify what was to happen to the money after it had been paid to the Registrar.
    ii. **Requirements:**
        1. UCPR r25.11 – P must show that the order is necessary to prevent frustration/inhibition of court processes.
        2. UCPR r25.14(1)(b) – P must show a *good arguable case* on an accrued/prospective CoA.
    iii. *Carlile v LED Buildings:* can FOs be extended to freezing the assets of **third parties** who were not part of the proceedings?
        1. UCPR r25.14(5) empowers court to issue FO agaisnt 3rd party if there is a risk that a judgment will not be satisfied because the 3rd party controls the debtor's assets *or* there is a process through which the 3rd party may be obligated to provide funds/property to help satisfy any potential judgment.
- *Practice Note SC Gen 14* – does not limit judicial discretion but provides guidance. Party subject to FO can apply to the court at any time to vary or discharge and order.
    - 6. 'A freezing order should be viewed as an **extraordinary interim remedy** because it can restrict the right to deal with assets even before judgment, and is commonly granted ex parte.'
    - 12.' The order should, where appropriate, **exclude** dealings by the respondent with assets for **legitimate purposes** (such as payment of ordinary living expenses or reasonable legal expenses)…'
    - 19. 'An applicant …is under a duty to make **full and frank disclosure** of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia.

<u>(5) Pre-commencement obligations</u>
1. 'Genuine' steps: solicitor must inform client about alternatives to fully contested adjudication of the case that are reasonably available: LPULAA r7.
2. 'Client care' obligations: ensure all **contracts** b/w lawyer and client promote a positive and fruitful r/s, once litigation commences – keep client **informed** of all steps in the process and their consequences, full **financial disclosure** – inform client that initiating proceedings may lead to prolonged involvement in court action with significant costs, together with all cost disclosures required under LPULAA.
3. Issue letter of demand
4. Verify that the claim has 'reasonable prospects of success': Schedule 2.2(1) – A law practice is not to act unless the practitioner responsible for the provision of services 'reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.' This Schedule applies despite any obligation to act in accordance with your client's instructions.
    a. Any claim or defence must contain **certification** of reasonable prospects: Schedule 2.4(2).
    b. There is a presumption that failure to comply is the **fault of the legal practitioner.**
    c. **Costs orders** may be made against a law practice that acts without reasonable prospects of success; those costs are **not recoverable** from the client: Schedule 2.5.

<u>(6) Commencing Proceedings</u>
Proceedings are commenced by filing an *originating process* (document that gives notice that a suit has been initiated) and by paying any relevant court and filing fees. It must be served on D **within 6 months from date of filing** in NSWSC, LEC, DDT, or LC (UCPR r6.2(4)(a)), **within 6 months from date of filing** in NSWDC if it is a SoC seeking relief in relation *only* to debt/liquidated claim or if D is to be served outside NSW (UCPR r6.2(4)(b)(i)), or **within 1 month from date of filing** in NSWDC (UCPR r6.2(4)(b)(ii)).