

LAWS5115: PROCEDURE

You may be expected to identify which court documents you need to use for an application to a Court, or any other purpose. You may be expected to identify what should, and should not, be included in the court documents (as such, or example, what orders you would seek from a Court, or what should be included in an affidavit).

In the exam, you should focus on getting the substance right (including citing appropriate court rules, practice directions and authorities), rather than form of an advice for example.

Your answers are not being marked as essays. Bullet point form is fine. But you should give reasons for your advice and answers.

When citing court rules or practice directions, it is acceptable to use obvious abbreviations such as RSC O 7 r 5 or CPD 4.5.1. When citing cases, you do not need to give the full citation; it is acceptable to use a short form abbreviation for the case. Ideally, you would underline the case name abbreviation to make it clear that it is a case name, e.g. Aon Risk.

26 minutes Question 1 is worth 13 marks. (1(a) = 6 marks,
1(b) = 7 marks)

16 minutes Question 2 is worth 8 marks.

38 minutes Question 3 is worth 19 marks. (3(a) = 12 marks
3(b) = 7 marks)

20 minutes Question 4 is worth 10 marks.

key

Start of topic

Section in code

Element

case

or (case)

***CF = compare

INTRODUCTION TO PROCEDURAL LAW

What is procedural law?

- “[T]he mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right”: **Poyser v Minors (1881) 7 QBD 329 at 333 (Lush J)**.
- civil actions commenced by writ of summons (claim by plaintiff against defendant for relief based on a cause of action).

WA Courts (focus)

- Supreme Court: Supreme Court Act 1935 (WA) + Rules of the Supreme Court 1971 (WA) (RSC) + Consolidated Practice Directions (CPD).
- District Court: District Court of Western Australia Act 1969 (WA) + District Court Rules 2005 (WA).
- Federal Court: Federal Court of Australia Act 1976 (Cth) + Federal Court Rules 2011 (Cth).

Sources of Procedural Law

- Legislation
- Rules of Court (e.g. RSC)
- Practice Directions
- Inherent jurisdiction/powers of superior courts

PURPOSE & CONCERNS OF PROCEDURAL LAW

- Attainment of justice: “rules and forms of procedure are not ends in themselves, but means to an end”: **Union Bank of Australia v Harrison Jones and Devlin Ltd (1910) 11 CLR 492 at 504 (Griffiths CJ)**.
- Fair and just determination of litigation.
- Public justice / open court principle.
- Principle of finality.
- Efficiency and proportionality (cost & delay control).
- Avoiding abuse of process.

Open Court Principle

- Essential characteristic of courts to sit in public: **Hogan v Hinch [2011] HCA 4; (2011) 243 CLR 506 at [20]–[26]**.
- Proceedings are public; fair and accurate reports may be published.
- Can be limited by court order only where necessary for administration of justice (categories not closed).

Procedural Fairness

- **Re Nolan; Ex parte Young (1991) 172 CLR 460 at 496 (Gaudron J)**: open enquiry, natural justice, ascertainment of facts + law, application of law to facts.
- **Wainohu v New South Wales (2011) 243 CLR 181 at [44]**: independence, impartiality, procedural fairness, open court, reasons for decisions.

OVERRIDING OBJECTIVE & CASE MANAGEMENT

RSC Order 1 rule 4A (Overriding Objective)

- Court must facilitate just, quick and cheap resolution of real issues.

RSC Order 1 rule 4B (Case Flow Management Objective)

- Manage cases to achieve just determination, efficiency, proportionality, timeliness, cost-effectiveness, and resource allocation.

Rejection of Earlier Approach

- **Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146** (Court used to place greater emphasis on justice between the parties in litigation over case management principles, overly rigid – justice paramount, case management secondary).
- Now: **Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 at [30] (French CJ)**: consider delay, cost, strain on litigants, public confidence.
- **Expense Reduction Analysts Group Pty Ltd v Armstrong [2013] HCA 46; (2013) 250 CLR 303 at [56]–[57]**: court controls process; parties must assist overriding purpose.

Active Case Management

- Continuous control by case manager (CPD 4.1.1).
- Specialist lists (e.g. Commercial and Managed Cases List).
- Court-ordered mediation often mandatory before trial.

PRINCIPLE OF FINALITY

D’Orta-Erkenaike v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1
Controversies, once resolved, not reopened except in narrow circumstances. Underpins res judicata, issue estoppel, restrictions on fresh evidence/appeals. Appellate system is the principal qualification.

JUDICIAL POWERS & INHERENT JURISDICTION

- Express powers in rules/legislation.
- Inherent jurisdiction/powers of superior courts to regulate process and prevent abuse.

Abuse of Process

- 3 categories of abuse **Jensen v Nationwide News Pty Ltd (No 6) [2018] WASC 415 at [27]–[29]**:
 - Invoked for illegitimate purpose.
 - Unjustifiably oppressive to a party.
 - Brings administration of justice into disrepute.

COSTS

- Solicitor and own client costs: contractual, client pays regardless of outcome.
- Party and party costs: court orders (e.g. “costs follow the event”, “costs in the cause”, “costs thrown away”). Usually partial recovery only.

Step 1: Dispute resolution clause?

- Check contract for expert determination, arbitration, mediation clauses.
- Courts generally enforce: *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASC 241; (2005) 31 WAR 187 (informality, speed, expertise, privacy, ongoing relationships).

Step 2: Identify type of proceeding

- Main focus: Action by writ (RSC O 4 r 1).
- Others: Originating summons (chambers), judicial review (O 56), Corporations matters, ex parte motions.

Step 3: Identify causes of action, relief sought, and proper parties

- Cause of action = factual situation entitling remedy: *Letang v Cooper* [1965] 1 QB 232.
- Multiple causes against same defendant: RSC O 18 r 1.
- Multiple parties: RSC O 18 r 4 (common question of law/fact + same transaction/series).
 - o If a party who is usually the plaintiff doesn't want to commence proceedings, they become a defendant

Step 4: Joinder Rules

- Joint rights: all must be parties (O 18 r 4(2)).
- Joint liabilities: all must be joined (O 18 r 4(3)).
- Joint & several / several liabilities: more flexible (consider proportionate liability).

Step 5: How particular parties sue/be sued

- Individuals: own name.
- Companies: full name + ACN; leave required if in liq/admin (Corporations Act ss 471B, 440D).
- Crown (WA): Crown Suits Act 1947 (WA) s 5.
- Partnerships: firm name (O 71 r 1).
- Persons under incapacity: next friend / guardian ad litem (O 70).

Step 6: Legal representation

- RSC O 4 r 3 – generally solicitor or self-represented.
- Rare inherent power for non-solicitor to speak for company: *Prow Pty Ltd v Commissioner for Police* [2012] WASC 363.

JURISDICTION

- Primary meaning: authority to decide.
- Two essential conditions: subject matter jurisdiction + personal (territorial) jurisdiction.
 - Subject matter jurisdiction: controversy is of a kind within the court's limits.
 - Personal jurisdiction: defendant is amenable to the exercise of judicial power (depends on ability to serve).
- State jurisdiction derived from State Constitution + State laws; federal jurisdiction from Australian Constitution + federal laws.
- Other classifications: appellate v original; concurrent v exclusive.

High Court – Subject Matter Jurisdiction

- Primary function: ultimate appellate court.
- Original jurisdiction: Constitution ss 75 & 76; Judiciary Act 1903 (Cth) s 30 (“all matters arising under the Constitution or involving its interpretation”).
- Exclusive jurisdiction: Judiciary Act s 38.

Federal Court – Subject Matter Jurisdiction

- Constitution s 77: original jurisdiction only with respect to matters in ss 75 & 76.
- Federal Court of Australia Act 1976 (Cth) s 19(1): original jurisdiction as invested by federal Parliament.
- Judiciary Act s 39B(1A) (from 1997): general jurisdiction over any matter arising under the Constitution or any laws made by the federal Parliament.
- Associated jurisdiction: FCA Act s 32 – matters associated with matters in which jurisdiction is invoked (must still be within ss 75/76 “matters”: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 493). Less important since 1997.
- Accrued jurisdiction: FCA Act s 22 – power to determine common law / non-federal claims that form part of the same “matter” (single controversy) as a federal claim.

Re Wakim; Ex parte McNally (1999) 198 CLR 511 at 585-86 [140]-[141]

Facts: Considered what constitutes a single “matter” for accrued jurisdiction.

Importance: Single matter if claims arise out of common transactions/facts or common substratum of facts (even if facts do not wholly coincide), or where determination of one is essential to the other. Completely disparate / distinct / unrelated claims are not the same matter. Risk of conflicting findings on common issues indicates a single matter.

- Incidental jurisdiction: power to achieve same goals as Supreme Court's inherent jurisdiction; founded on principle that a body performing a statutory function has all necessary and incidental powers.

State Courts Exercising Federal Jurisdiction

- Judiciary Act s 39(2) – invests State courts with federal jurisdiction (except exclusive High Court matters), within the State court's jurisdictional limits as to locality, subject-matter or otherwise.
- Other specific legislation may impose conditions/restrictions.

Supreme Court (WA) – Subject Matter Jurisdiction

- Supreme Court Act 1935 (WA) s 16 confers general subject matter jurisdiction; s 18 – specific probate jurisdiction.

- Almost always has subject matter jurisdiction subject to other laws and exclusive federal jurisdiction. Also has inherent jurisdiction (essentially procedural powers).

Supreme Court Inherent Jurisdiction

- Supreme Courts have an inherent jurisdiction to regulate their process and prevent abuse of process.
- **NH v DPP (SA) [2016] HCA 33; (2016) 334 ALR 191 at [67]–[69]:** powers to punish contempt, grant injunctions, protect subject matter, correct slips, stay proceedings to prevent abuse.
- Limits: **Furesh v Schor (2013) 45 WAR 546** – not at large; exercised only as necessary for administration of justice; cannot encroach on fundamental rights without legislative sanction.

Furesh v Schor

Q of whether court had inherent jurisdiction/power to compel a party to consent to mouth swab for DNA analysis to determine issue of paternity → HELD: NO

“While the inherent powers which a superior court has to control and supervise its proceedings cannot be restricted to defined and closed categories, the powers are not at large but are to be exercised only as necessary for the administration of justice ... The limits of the inherent jurisdiction are determined primarily by reference to the purposes served by its exercise, the chief among them being control of the court's procedures, suppression of abuses of its procedures, preventing attempts to thwart its process, and ensuring fairness in its proceedings” [48].

District Court (WA) – Subject Matter Jurisdiction

- District Court of Western Australia Act 1969 s 50(1); monetary limit \$750,000 (s 6) – does not include interest (s 50(1a)).
- No monetary limit on personal injury jurisdiction (s 50(2)).
- Incidental powers necessary for exercise of jurisdiction (correct irregularities, prevent abuse of process) but not equivalent to inherent jurisdiction of Supreme Court (e.g. no inherent supervisory jurisdiction over solicitors): *Murcia & Associates (a Firm) v Grey* [2001] WASCA 240; (2001) 25 WAR 209.
- No jurisdiction over claims for equitable relief unless expressly set out in s 50; no jurisdiction where primary relief is declaratory or injunctive. Can grant equitable relief that is ancillary/auxiliary/incidental to a claim otherwise within jurisdiction (ss 55, 57; *Commercial Developments Pty Ltd v Mercantile Mutual Insurance (Workers' Compensation) Ltd* (1991) 5 WAR 208 at 217).

Magistrates Court – Subject Matter Jurisdiction

- Magistrates Court Act 2004; Magistrates Court (Civil Proceedings) Act 2004 s 4 & 6.

does the court have jurisdiction?

Step 1: Does the court have subject matter jurisdiction?

- Identify the cause(s) of action and relief sought.
- Check the relevant court's enabling Act for limits (monetary, subject-matter, equitable relief, exclusive federal matters).
- For Federal Court: is there a federal “matter”? Any associated/accrued claims forming the same controversy? (is there an issue deriving from the constitutional powers)
- For District Court: is claim within \$750k (or personal injury)? Is equitable relief only ancillary?

Step 2: Does the court have personal (territorial) jurisdiction?

- Depends on service of originating process. Presence within the territory at time of service is sufficient (**Laurie v Carroll (1958) 98 CLR 310**).
- Long-arm jurisdiction available under rules of court or Service and Execution of Process Act 1992 (Cth) (SEPA).

LIMITATION PERIODS

- Limitation periods found in an array of legislation.
- Key Acts: Limitation Act 1935 (WA) (causes accrued before 15 Nov 2005); Limitation Act 2005 (WA) (causes accrued on or after 15 Nov 2005) – see s 4.
- Limitation Act 2005 does not (subject to exceptions) affect limitation provisions in other written laws: s 9. Example: Australian Consumer Law s 236(2).
- General rule (s 13(1)): action on any cause of action cannot be commenced if 6 years have elapsed since the cause of action accrued. S 13(2): does not apply if Division 3 provides a different period.

Specific Limitation Periods (Limitation Act 2005)

- Personal injury actions: s 14 (also ss 6, 55) – 3 years.
- Defamation actions: s 15 (also s 8) – 1 year from publication.
- Deeds: s 12 – 12 years.
- Action to recover land: s 19 (also Div 2) – 12 years.
- Equitable actions: defence of laches may still apply (unreasonable delay + prejudice).

Key Principles

- Effect of expiry: generally bars the remedy, does not extinguish the cause of action. Defendant must raise and specifically plead the limitation defence.
- Estoppel or waiver possible: Commonwealth v Verwayen (1990) 170 CLR 394.
- Time calculation (Handford): day cause of action arose is excluded; day proceedings commenced is included; time extends if court offices closed.
- “Action” includes court or arbitration proceedings (s 3 definition; s 12).

CASE: Commonwealth v Verwayen (1990) 170 CLR 394

Facts: Navy veteran sued for negligence years after the 1964 HMAS Voyager collision. Government initially assured it would not rely on limitation defence, then later sought to raise it.

Importance: Estoppel/waiver can prevent a defendant from relying on a limitation defence where it has induced the plaintiff to assume the defence will not be taken and the plaintiff has acted to their detriment.

Step 1: Does the Limitation Act 2005 (or other legislation) apply?

- What substantive law applies to the dispute? Is there a specific limitation provision under that Act? If not, Limitation Act applies.
- Is the cause of action before or after 15 Nov 2005?

Step 2: What is the relevant limitation provision for the cause of action?

- Identify the cause of action. Is it listed in the Limitation Act (or other Act)? Apply that period.

Step 3: When does the cause of action accrue?

- Time starts running when the cause of action accrues. Special provisions in the Act for some causes; otherwise general law / case law.
- Contract: accrues on breach (even if no loss yet suffered).
- Tort (negligence): generally requires damage – accrues when loss is suffered.
- Continuing obligations (e.g. monthly royalties): fresh cause of action for each missed payment.
- *Example – Building defect discovered 6–7 years later: contract claim accrues at time of breach (construction); negligence claim accrues when loss suffered.*

Step 4: Has time expired? What to do?

- If time is running out: commence proceedings immediately; or seek defendant's agreement to suspend/waive.
- If time has run out: consider extension under s 38 (fraud or improper conduct of defendant). Court may extend up to 3 years from when action ought reasonably to have been commenced. Does not apply to defamation.

Lowe Pty Ltd v Belgravia Nominees Pty Ltd [2020] WASCA 180

Facts: Limitation period sought to be extended where defendant participated in concealing unauthorised payments.

Importance: "Other improper conduct" under s 38(2) is broader than fraud and includes serious misconduct that prevents a plaintiff from discovering a cause of action. Extension available even without actual fraud.

ORIGINATING PROCESS

- Supreme Court (RSC O 4 r 1): Actions = writ of summons; chambers proceedings between parties = originating summons; all other civil proceedings = originating motion.
- Federal Court: single form – originating application (FCR r 8.01). Must state relief claimed (r 8.03); genuine steps statement (r 8.02); accompanying documents (r 8.05).
- Corporations Act / ASIC Act proceedings have specific originating process requirements.

Writ of Summons

- Form: RSC O 5 rr 1–2; place of trial (r 3); place of issue (r 4); sealing (r 6); time for appearance stated on writ (r 11).
- Indorsement of claim required: RSC O 6 r 1. May include statement of claim except for fraud, defamation, malicious prosecution, false imprisonment, seduction or breach of promise of marriage (O 6 r 3).
- Three functions of indorsement: (1) marks perimeter for statement of claim; (2) limitation ramifications; (3) notice to defendant of nature of claim and relief: *ABB Service Pty Ltd v Hetherington* [2001] WASCA 235 [7]–[15].
- Duration: valid for service for 12 months from date of issue (O 7 r 1(1)); power to extend (r 1(2)); concurrent writs (r 3). Court may direct hearing to show cause if not served after 6 months.

Originating Summons & Motion

- Originating summons: form and issue O 58 r 14; O 7 (duration) applies (r 15); time for appearance (r 16).
- Originating motion: need for notice unless ex parte (O 54 r 3); form (r 5); issue (r 6).

Step 1: Choose the correct originating process

- Is it an “action” (dispute of fact requiring pleadings/trial)? → Writ of summons.
- Is it a chambers matter between parties (construction of document, pure question of law)? → Originating summons.
- Other civil proceedings (e.g. some applications)? → Originating motion.
- Federal Court? → Originating application + genuine steps statement.

Step 2: Draft a sufficient indorsement of claim (writ)

- Must contain a concise statement of the nature of the claim and the relief or remedy required (O 6 r 1). Adequacy judged from the indorsement as a whole – no rigid formula.
- Must link the plaintiff to the facts, the defendant, and the damage/relief. Provide enough factual information to enable determination of when the cause of action accrued (limitation purposes).
- Where accrual coincides with a date of accident/breach, state the date or date range. For representation-based claims, need not plead every fact establishing accrual, but must enable a factual trail to the accrual date *ABB Service Pty Ltd v Hetherington*.

CASE: ABB Service Pty Ltd v Hetherington [2001] WASCA 235

Facts: Indorsement claimed damages under TPA s 82 for breach of s 52 and for negligent misstatement re representations made between 1 July 1996 and 28 Feb 1997 in connection with a contract between defendant and a third party (Monaveen). No link between plaintiffs