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(1) Introduction

(1.1) CONCEPTS & PERSISTENT ISSUES

- *Private international law...*
 - ...rules of domestic legal systems that assist courts in those systems resolve disputes involving contracts with foreign legal systems (i.e. rules governing how a NSW court deals with a 'foreign element' in torts and contracts cases).
 - Private international law regulates relations between private persons (both natural and legal).
 - Conflict of laws issues may arise in relation to virtually any aspect of private law, including the law of obligations (eg contract, tort and equity), the law of property (eg real property law, and succession), and family law (eg relating to marriage).
- *Conflicts may arise between the laws of Australian States and Territories. For some purposes Australia is one 'law area' ...*
 - (e.g. (a) in matters governed by federal law such as family law and bankruptcy; (b) in matters deriving exclusively from the common law, as there is only one common law in Australia): *Lloyd v Lloyd [1962] VR 70*
 - ...but for other purposes Australia is made up of nine 'law areas' (e.g. in relation to many areas of tort law)
 - 'international' means area outside the jurisdiction of NSW...
 - ...foreign/overseas jurisdiction; or
 - ...international (i.e. other states or territories of Australia; or other overseas jurisdictions). That is, states/territories considered distinct law areas or countries for PIL purposes, at least in private matters (eg torts/contracts).
 - Overseas jurisdictions might not be countries:
 - UK: England and Wales; Scotland; Northern Ireland.
 - US: each state is separate law area.
- *Three basic problems addressed by private international law...*
 - (1) Jurisdiction:
 - does the forum court have, and should it exercise, jurisdiction over foreign persons, matters and things; i.e. does the court have power to hear the case (including where the parties properly served) and, if so, should it hear this case or exercise its discretion not to (*forum non conveniens*) and should a court direct parties not to proceed in foreign courts (anti-suit injunctions)?
 - Jurisdictional issues often arise when a dft is not present in the forum or does not have sufficient connection with the forum, or where forum is inappropriate, in the circumstances, to determine the case.
 - ...if yes, if it has jurisdiction, should it exercise that jurisdiction...
 - ...if yes, then the case can proceed in NSW.
 - (2) Choice of law (applicable law):
 - which law applies? That of the forum (*lex fori*) or another law area? Choice of law issues arise when there are factors in the case which suggest that it would offend justice to apply the law of the forum.
 - ...in some cases, the NSWSC can apply the law of a foreign country (as proved by experts - i.e. proof of foreign law).
 - Applicable law (choice of law) is a basis for enabling service of process and is influential (and can even be determinative) of whether a court will exercise discretion to assume jurisdiction over a case.
 - (3) Foreign judgments:
 - where the case has proceeded to judgment in the other state or country - should the forum court recognise and enforce the judgment of a foreign court (i.e. make the losing party pay money another court ordered the losing party to pay?)
 - Recognition/enforcement cases may also raise jurisdiction and/or choice of law issues and jurisdictional considerations may include possible future enforcement issues.
- *Private international law and public international law comprise mostly distinct systems of law. Several points of distinction...*
 - (1) Private international law comprises rules of domestic law that identify which legal system applies to govern a particular dispute. These rules vary from law area to law area. Public international law, by contrast, is largely uniform and of universal application.
 - (2) Private international law deals with relationships between individuals, corporations and states in their private legal capacity. Public international law, on the other hand, deals primarily with the relationship between subjects having international legal personality (principally states).
- *Strategy...*
 - Often a strategic choice about where to bring claim or which law applies, which will determine outcome of the case. For example:
 - Only one jurisdiction will hear your case (either because it is out of +me in other jurisdictions or not within legal scope)
 - One jurisdiction gives much better remedies than other jurisdictions (e.g. US exemplary damages v damages capped).
 - Ds might have assets in particular jurisdiction.

- *Terminology*
 - *Forum* - the court or tribunal in which proceedings are brought
 - *Lex fori* - law of the place where proceedings are brought
 - *Lex causae* - law which, according to the private international law rule of the forum, applies to the cause of action
 - *Lex domicilii* - law of a person's domicile
 - *Lex loci contractus* - law of the place where the contract was concluded
 - *Lex loci delicti* - law of the place where the tort was committed
 - *Lex situs* - law of the place where relevant property is located

(1.2) CASE STUDIES

- ▶ *Oceanic Sun Line Special Shipping Co v. Fay* [1988] HCA 32; Brennan, Deane and Gaudron JJ; Wilson and Toohey JJ in dissent
 - Applications for the stay of proceedings brought in an Australian court should be determined in accordance with the tests stated in *St. Pierre v. South American Stores (Gath & Chaves) Ltd.*.
 - (1) ...the dft must prove that the continuance of the action would be an injustice, because it would be oppressive, vexatious or otherwise an abuse of process (burden of proof on the dft).
 - (2) ...the stay must not cause an injustice to the ptf (burden of proof on the dft).
 - In the present case...the NSWSC was not a 'clearly inappropriate forum'...
 - (i) Lex fori (i.e. Law of Australia) applied to determine preliminary question of contract formation not putative law of contract.
 - (ii) the contract of carriage had been concluded in NSW;
 - Toohey and Wilson "...notwithstanding our conclusion that the contract was made in NSW, ... prima facie the proper law of the contract is the law of Greece The test for discovering the proper law of the contract – that is, in general terms, 'the substantive law of the country which the parties have chosen as that by which their mutually enforceable rights are to be ascertained.'"
 - (iii) the conditions on the ticket did not form part of the contract
 - to answer this question, it is necessary to decide when the contract of carriage is made and by reference to what system of law are its terms to be ascertained.
 - the payment of the fare is not necessarily the making of the contract: it may be a pre-payment of the consideration payable under a contract of carriage yet to be made out; or it may be a payment of the consideration payable under a contract of carriage thereupon made; or it may be the payment of the price of an option to require the carrier to carry the passenger, perhaps subject to certain condition.
 - Other indicia tending towards the same conclusion include: the flag of the M.S Stella Oceanis; the domicil of the ship owner and operator; the fact that the ship was to sail from the return to Piraeus and cruise in Greek waters.
 - a submission to the exclusive jurisdiction of the tribunals of a particular country is an indicium of the parties' intention that the law of that country is to be the proper law of their contract.
 - In the present case, if the supposed submission to the exclusive jurisdiction of the Athenian court is in truth a term of the contract of carriage governing the liability of the dft for the ptf's injury, there is a significant indicium that Greek law is the proper law of that contract.
 - The question whether a contract has been made depends on whether there has been a consensus ad idem and the terms of the contract, if made, are the subject of that consensus
 - There is no system other than the municipal law to which reference can be made for the purposes of answering the preliminary questions whether a contract has been made and its terms.
 - The lex fori determines questions as to the existence, construction and validity of terms bearing upon determination of the parties' agreement as to the proper law.
 - In the present case, it is fairly arguable that the substantive law of NSW is applicable in the determination of the rights and liabilities of the parties.
 - (iv) the action should not be stayed..Court should reject jurisdiction only where Australia is a 'clearly inappropriate forum'.
 - [Dr Fabian Fay, a Queensland resident, made a booking in New South Wales through a New South Wales travel agent, JMA Tours, for a cruise in the Greek Islands on the 'Stella Oceanis', a vessel owned by a Greek company, Oceanic Sun Line Special Shipping Co. Dr Fay was given an 'exchange order' by JMA Tours which stated that it would be exchanged for a ticket when he arrived in Greece; that ticket contained a condition (clause 13) that the courts of Greece should have exclusive jurisdiction in any action against Oceanic, and also that it should be governed by Greek law. The legal dispute arose when Dr Fay was severely injured while taking part in trap shooting on board the vessel. Dr Fay consequently brought a cause of action in negligence against Oceanic Sun in the Supreme Court of New South Wales, seeking damages for his injuries. *Appeal dismissed: The exclusive jurisdiction clause was not incorporated into the contract, being formed in New South Wales- and it was unknown to Dr Fay and no attempts were made to bring it to his attention.*]

- ▶ *Venter v Ilona MY Ltd; Ilona MY Ltd v MD Engineering Gesellschaft mit beschränkter Haftung* [2012] NSWSC 1029
 - The Court followed *Fay*, which held that the terms of condition of trading WERE part of the contract..
 - ... i.e. use the law of the place of hearing to determine whether term is part of contract. (Under German law, would not have been incorporated into the contract because no evidence that the “Terms and Conditions of Trading” had been attached to the manufacturer’s quotation.
 - If parties include a foreign jurisdiction clause in the contract, courts have a ‘firm disposition’ to hold parties to bargain. Owners had not provided strong reasons as to why they should not be held to the exclusive jurisdiction clause.
 - Owners’ cross claim was stayed
 - [but] Rein J made obiter dicta that New South Wales was not a ‘clearly inappropriate’ forum, because:
 - Mrs Venter had regularly invoked the jurisdiction of the Supreme Court of New South Wales
 - Two of the shipowners were companies registered in New South Wales
 - Mrs Venter made one claim based on New South Wales legislation: Compensation to Relatives Act 1897 (NSW)
 - Mrs Venter had settled with the shipowners - the validity of that settlement may need to be investigated.
 - As to the tort claim...
 - ...Tort (failure to provide safe place of work) probably occurred within territorial sea of Thailand, but might have been in international waters (high seas).
 - Tort claim was settled, but:
 - If occurred in Thailand, then Thai Law limitation period (1 year) might have applied (it had expired).
 - If on high seas, then tort would have been committed in place of registration of the ship (Australia). NSW had 3 year limitation (had not expired).
 - [Christian Venter, a South African engineer on the ‘Ilona’, was crushed to death at sea when a hatch cover malfunctioned and collapsed on top of him (probably while cruising off coast of Thailand). The ‘Ilona’ was owned by companies registered in Jersey and New South Wales, but itself was registered in Australia. Venter’s American wife, Rachel, brought a cause of action in negligence and under the Compensation to Relatives Act 1897 (NSW) for the death of her husband, seeking damages for her depression. Rachel Venter settled her claim with the shipowners (about where the accident occurred), but in seeking contribution as a joint tortfeasor, the shipowners joined as a cross-defendant the manufacturer of the hatch cover, MD Engineering, a German company. MD Engineering sought to stay the proceedings in the NSWSC on the basis of the existence of an exclusive jurisdiction clause for all claims to be heard in Bochum, Germany, in its contract with the shipowners, and further that: The cross-defendant, MD Engineering, was a German company; The employees of MD Engineering were German; The law of the contract was expressed to be German law; The design, manufacture and installation of the hatch cover was carried out in Germany; *Owners’ cross claim was stayed. There were no strong countervailing reasons for it being inappropriate to hold the parties of the shipowners and MD Engineering to their bargain (but it would have been different if the dispute between Mrs Venter and the shipowners had not been settled) - the exclusive jurisdiction clause was upheld and the proceedings were permanently stayed.*]

(1.3) SOURCES OF LAW & DOCTRINE OF STARE DECISIS

(1.3.1) Within Australia - do interstate and foreign cases count?

- Common law is main source of Private International Law
- HC definitive and establishes 'one common law' for whole of Australia.
- ▶ **Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89
 - If no HC decision, to what extent are NSW courts bound by decisions of interstate or foreign courts?
 - "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong. Since there is a common law of Australia rather than of each Australian jurisdiction, the same principle applies in relation to non-statutory law." (Citations omitted) [quoted in *Gett v Tabet* [2009] NSWCA 76]
 - Lower courts are bound by 'seriously considered dicta' of the HCA ([134] and [158])

(1.3.2) Overseas Judgments

- ▶ *Cook v Cook* [1986] HCA 73; (1986) 162 CLR 376
 - "Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning." (Mason, Wilson, Deane and Dawson JJ [19])
- ▶ *Union Shipping New Zealand Ltd v Morgan* [2002] NSWCA 124
 - "Arguably *Cook v Cook* must be understood as not glossing over the differences between passing dicta, considered dicta, and rationes decidendi; nor the difference between statements proceeding from highly experienced lawyers of good reputation in ultimate appellate courts and statements proceeding from other persons."
 - [Primary judge had followed 19th C decision and much criticised 1955 decision of Scowsh Inner house (*McKinnon*), rather than 3 US SC decisions, which the D argued were highly persuasive.]

(1.3.3) Constitutional Provisions

Commonwealth of Australia Constitution Act

Section 118 - Recognition of laws etc. of States

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

- If the NSWSC has to apply in a particular case the law of another state or territory in Australia - it can't refuse to apply that law on the basis that the public policy interests of the NSWSC are breached by that state or territory law (only in respect of overseas jurisdictions).
- What relevance s 118 of the Constitution ('Full faith and credit shall be given throughout the Commonwealth, to the laws, the public Acts and records and the judicial proceedings of every State')?
 - Does it displace common law choice of law rules? S118 does not override the common law choice of law rules - it has no effect on choice of law: *McKain v RW Miller & Company (SA) Pty Ltd* (1992) 174 CLR 1; *John Pfeiffer Pty Ltd v Rogerson* 203 CLR 503.
 - In proceedings by P in NSW for a tort committed in the ACT would a NSW court be obliged to apply ACT law which afforded D complete defence because P was guilty of contributory negligence?
 - *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503: 's 118 does not state any rule which dictates what choice is to be made if there is some relevant intersection between legislation enacted by different States. Nor does it...state a rule which would dictate what common law choice of law rule should be adopted'.

(1.3.4) Legislation

- ◆ *Service and Execution of Process Act 1992 (Cth)* *Service of originating process from any court to any other court within Australia*
- ◆ *Foreign Judgments Act 1991 (Cth)*
- ◆ *Foreign Evidence Act 1994 (Cth)* *and enactments of States and Territories*
- ◆ *Trans-Tasman Proceedings Act 2010 (Cth)* *(service, jurisdiction and enforcement)*

(2) Jurisdiction

- *Jurisdiction - the power of a court to handle a case...Whether the court has the power is determined by the rules of the forum.*
 - ...Can the NSW court hear the case if the case has a foreign element?...and if so, should it refuse to exercise that discretion?
- *In action in personam the limits of jurisdiction are defined by the rules relating to service of process (e.g. writ or statement of claim).*
 - Those rules derive from the common law and from statute.
 - If there is no valid service of process, then unless the foreign D submits to jurisdiction, a court cannot exercise jurisdiction over the D.
- *Under common law, 2 bases upon which court can establish jurisdiction over dft:*
 - (1) physical presence of dft in the jurisdiction
 - (2) D submits to jurisdiction
- *Three statutory grounds to establish jurisdiction..*
 - (1) ...served interstate under *Service and Execution of Process Act 1992* (Cth) s15(1)
 - (2) ...served overseas under *Uniform Civil Procedure Rules 2005* (NSW) s11 Sch 6
 - (3) ...served in NZ under *Trans-Tasman Proceedings Act 2010* (Cth)
- ▶ *Lipohar v R [1999] HCA 65*
 - 'Jurisdiction' can give rise to difficulties because it is a generic term used to mean many things. Eg...
 - competence jurisdiction (power to apply federal v state laws)
 - Inherent jurisdiction (power of court to make particular orders, even absent specific rules)
 - 'law area' or 'law district'.
 - Subject matter of actions that a court can hear.
 - But here, we mean: amenability of D to court's writ and geographical reach of that writ.

(2.1) COMMON LAW

- **Basic rule: Dft must be 'amenable' to service of court's initiating process, which in most personal actions is a writ of summons...**
 - ...the Supreme Court will have power (jurisdiction) to hear and determine an action when the dft is physically present in the relevant state or territory at the time of service
 - ...the Federal Court and the High Court (in its original jurisdiction) will have power to hear and determine an action when the dft is physically present in Australia at the time of service.
- **There are only two grounds on which a court can exercise jurisdiction at common law**
 - (1) the defendant is present in the forum, or
 - (2) the defendant submits to the jurisdiction of the forum court
 - Otherwise, an Australian court only has jurisdiction over individuals outside its own territorial limits where an extraterritorial jurisdiction has been validly conferred on the court by statute: *Mercedes-Benz AG v Leiduck [1995] 3 All ER 929, 936.*

(2.1.1) Territorial jurisdiction based on defendant's presence

(i) Individuals

- *Two stage process...*
 - (1) Ptf (or lawyers) prepares originating process (writ, claim, originating summons, motion, petition) and files with court, which checks formalities and date stamps. This is when originating process is issued.
 - (2) Ptf must then arrange for originating process to be served on dft (usually by handing to dft or, if dft is a company, delivering to company's address).
- ▶ *Gosper v Sawyer [1985] HCA 19; Mason & Deane JJ*
 - 'The general doctrine of the common law is that...
 - ...in the absence of a submission to the jurisdiction by a defendant, civil jurisdiction is territorial...
 - [T]he ordinary basis of territorial jurisdiction is the personal presence of the dft within the court's territory...
 - The usual method by which a court asserts such jurisdiction is the issue (or, arguably, the issue and service) of its writ or other process directed to the dft.
 - *Since the effective assertion of jurisdiction is confined by the limits of the actual jurisdiction, a court's power to issue process in an action in personam, is prima facie exercisable only against those present within the limits of its territory at whatever be the relevant time or times.*

When does the dft need to be present in the jurisdiction? (i.e. will presence at time of issuance of originating process suffice?)

► *Laurie v Carroll* (1958) 98 CLR 310

- In the case of personal service within the jurisdiction of a writ of summons in an action in personam...it is enough that the defendant is present in the territory of the court at the time of the service - “
 - ...i.e. a court has jurisdiction when the dft is amenable to the court’s originating process, which is the time at which the writ is both issued and served...the amenability of the dft depends on nothing but presence within the jurisdiction.
 - ...service of the writ perfects the dft’s duty to obey the command to appear.
 - ...the dft being in the jurisdiction before originating process being issued is not a basis of common law jurisdiction, which relies on presence.
 - ...substituted service cannot be ordered when a person is not in the jurisdiction when the writ is issued.
 - If dft is in jurisdiction when originating process is issued, but leaves before that originating process is served, the jurisdiction is NOT established.
 - Exception..If a defendant knowing of the issue of the writ goes abroad before personal service or, although he does not positively know of the fact of the issue of the writ, goes abroad to evade service, doubtless he may be treated as under notice of the obligation of its command
 - i.e. .if originating process is issued and dft leaves either...
 - ... knowing that it has been issued;
 - ...or to evade service.
 - In both cases, the court can issue substituted service.
 - [Involved a contractual dispute between Laurie, a theatrical agent in London, and Carroll, a theatrical entrepreneur in Melbourne, over profits arising from Dame Margot Fonteyn’s 1957 Australian tour. Laurie was in Victoria between 11 and 13 June 1957 for Dame Margot’s Melbourne performances, and then travelled to Sydney. The writ in the action issued out of the VSC on 14 June. Laurie had been involved in negotiations to settle the dispute, and and was aware that Carroll might sue. He left Australia on 20 June, without ever having been served with the writ. Carroll applied on 21 June for an order allowing substituted service of the writ on Laurie’s solicitors in Melbourne. Herring CJ made the order, but Laurie successfully appealed to the HC to have the order set aside. Laurie had left Victoria one day before the writ was issued, and was therefore outside the jurisdiction of the state’s Supreme Court.]
- *Joye v Sheahan* (1996) 62 FCR 417
- If dft knew service was coming and left jurisdiction to avoid service, the court can order substituted service to satisfy personal jurisdiction...but if the dft leaves jurisdiction after writ issued and before service, not knowing of the existence of the writ, then the court will not have jurisdiction.
 - ...In this sense, the court decided that where a person is outside the jurisdiction, presence in the jurisdiction at the time of issue of the writ was a necessary (but not necessarily sufficient) element before substituted service could properly be ordered.
 - It seems likely though, that mere presence, without more, at the time of issue is insufficient...
 - It would be a curious result if the mere transient presence of a traveller at the international transit lounge of an Australian airport or in Australian air space, at the time of the issue of the writ, but where that person had no knowledge of the proceedings, let alone any intention to evade service, would entitle an order for substituted service later to be made on that person (i.e. if dft leaves jurisdiction after writ issued and before service, but did not know of existence of writ, then court will not have jurisdiction).
 - [1 November 1994: Sheahan applied to FCA for order that Joye attend examination about company affairs. 25 November: Court made order. Joye still in Oz. 9 December Joye’s solicitors served with summons. 13 December Joye departed jurisdiction. 2 Feb 1995 – Sheahan sought order for substituted service on J. Strong suggestion that J knew of service and left country in order to evade service, hence order for substituted service was granted. Request to HC for special leave was rejected]

How long does the dft need to be present?

► *Laurie v Carroll* (1958) 98 CLR 310

- it does not matter how temporary may be his [sic] presence, how fleeing may be his [sic] visit...all that is required is that service is perfected”...

- ▶ *HRH Maharanee of Baoda v Wildenstein [1972] 2 QB 283*
 - *Service of the originating process on the defendant during a fleeting visit to the forum is sufficient to establish common law jurisdiction.*
 - However, under the forum non conveniens principle, the court may decline to exercise jurisdiction if the defendant demonstrates that continuance of the proceedings in the forum would constitute an injustice to the defendant (i.e. that the proceedings are oppressive or vexatious to the defendant) and that a stay of proceedings would not constitute an injustice to the plaintiff.
 - If a defendant is properly served with a writ while he is in this country, albeit on a short visit, the plaintiff is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's court; and he is entitled to require those courts to proceed to adjudicate upon his claim.
 - *The courts should not strike it out unless it comes within one of the acknowledged grounds, such as that it is vexatious or oppressive, or otherwise an abuse of the process of the court.*
 - It does not become within those grounds simply because the writ is served on the defendant while he is on a visit to this country. If his statement of claim discloses a reasonable cause of action, he is entitled to pursue it here, even though it did arise in a foreign country.
 - It is not stayed unless it would plainly be unjust to the defendant to require him to come here to fight it, and that injustice is so great as to outweigh the right of the plaintiff to continue it here.
 - [The plaintiff, an Indian princess who was a French resident, bought in France a painting purported to be by the 17th century French artist François Boucher for £32 290, from the defendant, Daniel Wildenstein. The plaintiff issued a writ in England in September 1969, but only served it on the defendant in June 1970 when Wildenstein was in England temporarily for the Ascot races. The Court of Appeal held that the writ had indeed been properly served ("even though it may have ruined his day at the races": Edmund Davies LJ)].

For what purposes does the dft need to be present?

- ▶ *Perrett v Robinson [1985] 1 Qd R 83*
 - *The purpose of the dft's visit to the jurisdiction is irrelevant...*
 - ...unless the the ptf tricked/fraudulently enticed or coerced the dft into the jurisdiction to be served.
 - *There could be no fraud where the dft has entered into the jurisdiction 'willingly and knowingly for the purpose of being so served (McPherson J).*
 - ...there was no injustice 'in exposing the licensed insurer to the liability which it contracted to bear (Connolly J); (in the insurance contract, FAI had agreed to be liable for damages in Qld, plus had presence in Qld, so fell within jurisdiction of QSC anyway).
 - [The plaintiff, Mr Perrett, was injured in a motor vehicle collision on the Stuart Highway in the Northern Territory, due to the negligence of the defendant, Mr Robinson, who was driving a car registered in Queensland. Although the plaintiff and the defendant were residents of the Northern Territory, the plaintiff requested the defendant to willingly travel to Queensland to be served, where the plaintiff would be entitled to higher damages than the Northern Territory. The defendant willingly complied with the plaintiff's request, because his insurer, FAI Insurance, would ultimately pay the damages anyway. But FAI Insurance, joined to the action, argued that the Supreme Court of Queensland did not have jurisdiction, as the plaintiff and defendant had conspired to defraud it. QCA held that there was jurisdiction - the dft was validly served and no fraud was committed.]

(ii) Personal service (mode of service)

Uniform Civil Procedure Rules 2005 (NSW)

Rule 10.20 - Personal service required only in certain circumstances

- (1) Any document required or permitted to be served on a person in any proceedings may be personally served, but need not be personally served unless these rules so require or the court so orders.
- (2) Except as otherwise provided by these rules:
 - (a) any originating process, and any order for examination or garnishee order, in proceedings in the Supreme Court, the Industrial Relations Commission (including the Commission when constituted as the Industrial Court), the Land and Environment Court, the District Court or the Dust Diseases Tribunal must be personally served...

Rule 10.21 - How personal service effected generally

- (1) Personal service of a document on a person is effected by...
 - ... leaving a copy of the document with the person or,
 - ...if the person does not accept the copy, by putting the copy down in the person's presence and telling the person the nature of the document.
- (2) If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person.
- (3) Service in accordance with subrule (2) is taken to constitute personal service.

(iii) Substituted Service - What if the dft is present in the jurisdiction, but cannot be served?

Uniform Civil Procedure Rules 2005 (NSW)

Rule 10.14 - Substituted and informal service generally

- (1) If a document that is required or permitted to be served on a person in connection with any proceedings:
 - (a) cannot practicably be served on the person, or
 - (b) cannot practicably be served on the person in the manner provided by law,the court may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned.
- (2) An order under this rule may direct that the document be taken to have been served on the person concerned on the happening of a specified event or on the expiry of a specified time
- (3) If steps have been taken, otherwise than under an order under this rule, for the purpose of bringing the document to the notice of the person concerned, the court may, by order, direct that the document be taken to have been served on that person on a date specified in the order.
- (3A) An application for an order under this rule must be supported by an affidavit by the applicant that includes:
 - (a) a statement as to the applicant's knowledge of the whereabouts of the person to be served, and
 - (b) a statement as to any communications that have occurred between the applicant and the person to be served since the cause of action in the proceedings arose (including any communications by telephone, fax or electronic mail).
- (4) Service in accordance with this rule is taken to constitute personal service.

[NB: Substituted service equates to personal service (i.e. same jurisdictional scope), not service

(iv) Corporations**Steps**

(1) Is it an Australian corporation? See Corporations Act - Then it is present

(2) Is it a registered corporation? - Then present

(3) Is it an unregistered foreign corporation?

- Then go through the *Wimborne* indicia – if it fails, no presence

[NB: The court has no jurisdiction over a company which terminates its business in the forum before being served with initiating process in the action.]

▶ **National Commercial Bank v Wimborne (1979) 11 NSWLR 156*

- *A foreign person, or corporation (that is not registered in Australia) is not subject to the jurisdiction of this Court in a personal action unless he or it is present in NSW or has voluntarily submitted or waived the right to object to the jurisdiction...*

- *...A corporation is present within the jurisdiction if it carries on its business within that jurisdiction. This is a question of fact to be determined by reference to several indicia.*

- *Indicia...three criteria that establish that a corporation is carrying on its business in the forum...*

(1) *...it must be carrying on its business here and this it can do only by an agent and will not be doing unless the agent has authority on behalf of the corporation to make contracts with persons in NSW binding on the corporation (i.e. must have an agent with authority to make contracts with people in NSW on behalf of the company)*

- *It is not enough to show that the foreign corporation has an agent here if he is a mere ministerial agent or is carrying on his own business and not that of the foreign corporation.*
- *It is hardly necessary to add that such presence is not established by showing that the foreign corporation has appointed a local solicitor to commence or defence particular legal proceedings in the jurisdiction (engaging a solicitor does not count).*

(2) *...the business must be carried on at some fixed and defined place within the State.*

- *It is not essential to find, but relevant to consider whether...*
 - *...the name of the foreign corporation is displayed at the agent's place of business*
 - *...whether it owns or leases the premises or pays the rent*
 - *...whether it employs staff or particular staff are allocated by the agent to its business and it pays their wages or pays office expenses,*
 - *...indeed anything which one would expect to find in a particular territory.*
- [NB: insufficient: website business that sells goods to IP users from forum and imports them to forum: *Lucasfilm*.]

(3) *...the business must have continued for a sufficiently substantial period of time.*

- *An Australian corporation, registered in Australia, main office in NSW, is obviously present...*
- [The relevant issue was whether NCB, a corporation established under Saudi Arabian law, was present/carrying on business in NSW and, on that account, subject to the common law jurisdiction of the Supreme Court of NSW in proceedings for abuse of legal process by NCB in Switzerland. Saudi Arabian bank, no assets, no branch, no agency or place of business in NSW. But a few times used Sydney Bank collecting proceeds of bills of exchange from NSW importers and remitting proceeds to NCB in SA. *Holland J*: NCB not present in jurisdiction, claim struck out.]

▶ *Pan Australia Shipping Pty Ltd v The Ship 'Comandante' (No 2) [2006] FCA 1112*

- *A foreign plaintiff, either an individual or a corporation, who is not otherwise subject to the jurisdiction of the court and brings proceedings in the court, submits itself by necessary implication to any counter-claim which would operate as a defence to the proceeding or could be relied on as a set-off or cross-claim arising out of the same subject matter which would reduce or extinguish the plaintiff's claim...*

▶ *Sunland Waterfront (BVI) Ltd v Prudentia Investments P/L (No 2) [2012] VSC 239*

- *As to the third indicia...that the business must have continued for a sufficiently substantial period of time...*
 - *...there must be a degree of 'system, continuity and repetition' - a single instance, or ad hoc instances, are insufficient...*

Corporations Act - (Registered corporations) Carrying on business

- Foreign corporations carrying on business in Australia must register as foreign corporations and to establish local office (s 601CD; 601CT(1), Corporations Act 2001).
- Foreign corporations can appoint agents (601CF(1)), who can be served with originating process (601CX(1)(b)).
- All companies conducting business in Australia are amenable to jurisdiction of all state and territory courts (Ss 9 and 15 of *Service and Execution of Process Act 1992 Cth*), even if does not conduct business in the state/territory forum.
 - ...i.e. a NSW court can issue originating process out of NSW for service on a corporation in another state or territory - and that service will be effective.
- If foreign company NOT registered in Australia, need to rely on common law rules (see *Wimborne*) or service out of jurisdiction.

Corporations Act 2001 (Cth).**Section 21 - Carrying on business in Australia or a State or Territory**

- (1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be.
- (2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body:
 - (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or
 - (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.
- (3) Despite subsection (2), a body corporate does not carry on business in Australia, or in a State or Territory, merely because, in Australia, or in the State or Territory, as the case may be, the body:
 - (a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or
 - (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
 - (c) maintains a bank account; or
 - (d) effects a sale through an independent contractor; or
 - (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or
 - (f) creates evidence of a debt, or creates a security interest in property, including PPSA retention of title property of the body; or
 - (g) secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or
 - (h) conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or
 - (i) invests any of its funds or holds any property.

Section 601CD - When a foreign company may carry on business in this jurisdiction

- (1) A foreign company must not carry on business in this jurisdiction unless:
 - (a) it is registered under this Division; or
 - (b) it has applied to be so registered and the application has not been dealt with.
- (2) For the purposes of this Division, a foreign company carries on business in this jurisdiction if it:
 - (a) offers debentures in this jurisdiction; or
 - (b) is a guarantor body for debentures offered in this jurisdiction;
 and Part 2L.1 applies to the debentures.

Section 601CF - Appointment of local agent

- (1) A foreign company may at any time appoint a person as a local agent (who can be served with originating process: s601CX (1)(b))

Corporations - Method of service

Uniform Civil Procedure Rules 2005 (NSW)

Rule 10.22 - Personal service on corporation

Personal service of a document on a corporation is effected:

- (a) by personally serving the document on a principal officer of the corporation, or
- (b) by serving the document on the corporation in any other manner in which service of such a document may, by law, be served on the corporation.

Corporations Act 2001 (Cth)

Section 109X - Service of documents

(1) For the purposes of any law, a document may be served on a company by:

- (a) leaving it at, or posting it to, the company's registered office; or
- (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
- (c) if a liquidator of the company has been appointed--leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
- (d) if an administrator of the company has been appointed--leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.

Section 601CX - Service of documents on registered body

(1) A document may be served on a registered body:

- (a) by leaving it at, or by sending it by post to, the registered office of the body; or
- (b) in the case of a registered foreign company--by leaving it at, or by sending it by post to, the address of a local agent of the foreign company, being:
 - (i) in a case to which subparagraph (ii) does not apply--an address notice of which has been lodged under subsection 601CG(1); or
 - (ii) if a notice or notices of a change or alteration in that address has or have been lodged under subsection 601CV(1)--the address shown in that last-mentioned notice or the later or latest of those last-mentioned notices.

(2) For the purposes of subsection (1), the situation of the registered office of a registered body:

- (a) in a case to which neither paragraph (b) nor paragraph (c) applies--is taken to be the place notice of the address of which has been lodged under paragraph 601CB(e) or 601CE(g); or
- (b) if only one notice of a change in the situation of the registered office has been lodged with ASIC under subsection 601CT(3)--is, on and from:
 - (i) the day that is 7 days after the day on which the notice was lodged; or
 - (ii) the day that is specified in the notice as the day from which the change is to take effect;whichever is later, taken to be the place the address of which is specified in the notice; or
- (c) if 2 or more notices of a change in the situation of the registered office have been lodged under subsection 601CT(3)--is, on and from:
 - (i) the day that is 7 days after the day on which the later or latest of those notices was lodged; or
 - (ii) the day that is specified in the later or latest of those notices as the day from which the change is to take effect;whichever is later, taken to be the place the address of which is specified in the relevant notice;

and is so taken to be that place irrespective of whether the address of a different place is shown as the address of the registered office of the registered body in a return or other document (not being a notice under subsection 601CT(3)) lodged after the notice referred to in paragraph (a) or (b), or the later or latest of the notices referred to in paragraph (c), was lodged.

(3) Without limiting the operation of subsection (1), if 2 or more directors of a registered body reside in Australia or an external Territory, a document may be served on the body by delivering a copy of the document personally to each of 2 of those directors.

(3A) Without limiting the operation of subsection (1), a document may be served on a registered body that is registered as a proprietary company and has only one director by delivering a copy personally to that director.

(4) Where a liquidator of a registered body has been appointed, a document may be served on the body by leaving it at, or by sending it by post to, the last address of the office of the liquidator notice of which has been lodged.

(5) Nothing in this section affects the power of the Court to authorise a document to be served on a registered body in a manner not provided for by this section.