

6. International litigation

Last modified on 15 July, 2010.

Introduction

Part II of this report – an overview

6.1 As mentioned in chapter 1, Part II of this report outlines current Australian law on international litigation and arbitration. Chapters 6 to 10 focus on litigation commenced in Australia seeking remedies where the relevant person or asset is outside Australia but the transaction has some connection with Australia. Chapter 11 on arbitration is premised on the same mix of cross border elements. These chapters provide some background to the comments and recommendations in Part I of the report and address the summaries and other analysis required by sections 2 and 3 of the terms of reference.

This chapter

6.2 The first section of this chapter – conducting international litigation – gives an overview of jurisdictional and related issues and how they arise. The subsequent sections discuss specific aspects of those issues including jurisdiction, service, enforcement and evidence.

Conducting international litigation

Sovereignty and jurisdiction

6.3 At the heart of all the issues about the conduct of international litigation is the question of sovereignty. In general terms remedies ordered by an Australian court are only enforceable within Australia and its territories. The courts and administrative agencies of other nations are similarly constrained. Their remedies are generally only enforceable within their own territory.

(အပြည်ပြည်ဆိုင်ရာတရားစီရင်ရေးစနစ်နှင့်ပတ်သက်သောကိစ္စရပ်များ၏အဓိကအချက်မှာအချုပ်အခြာအာဏာ၏ပြဿနာဖြစ်သည်။

ယေဘုယျအားဖြင့်ဩစတြေးလျတရားရုံးမှအမိန့်ပေးသောကုစားမှုကိုAustraliaစတြေးလျနှင့်၎င်း၏နယ်မြေများတွင်သာပြုလုပ်နိုင်သည်။

အခြားနိုင်ငံများ၏တရားရုံးများနှင့်အုပ်ချုပ်ရေးအေဂျင်စီများသည်လည်းအလားတူအတားအဆီးရှိသည်။

သူတို့၏ကုစားမှုကိုယေဘုယျအားဖြင့်၎င်းတို့ပိုင်နက်နယ်မြေအတွင်းတွင်သာပြဌာန်းနိုင်သည်။

6.4 Disputes with a cross border element therefore inevitably give rise to arguments about jurisdiction. Does the Australian court have jurisdiction to make an order against a person or asset outside Australia? Does a foreign court have jurisdiction to hear the dispute as well as, or instead of, the Australian court?

6.5 Much of the complexity, cost and delay involved in international litigation arises out of the complexity of jurisdictional issues. There is great scope for parallel proceedings in two or more countries, for incomplete or inadequate remedies out of any one court and for lengthy argument challenging jurisdiction. For any particular cross border dispute there are likely to be overlaps or gaps between the jurisdiction of the relevant Australian court and

the jurisdiction of courts outside Australia. The jurisdiction of the courts outside Australia will be determined by their own legal system. To provide a basis for analysis this report sets out the principles governing jurisdiction in Australian proceedings.

ရှုပ်ထွေးမှု၊ ကုန်ကျစရိတ်နှင့်နှောင့်နှေးမှုများသည် တရားစီရင်ပိုင်ခွင့်ဆိုင်ရာ ကိစ္စရပ်များ၏ ရှုပ်ထွေးမှုကြောင့် နိုင်ငံတကာ တရားစွဲဆိုမှုတွင်ပါ ဝင်ပတ်သက်မှုများစွာ ပေါ်ပေါက်လာသည်။

နိုင်ငံနှစ်ခုသို့မဟုတ် နှစ်ခုထက်ပိုသော ပြိုင်ဆိုင်မှုဆိုင်ရာ တရားစွဲဆိုမှုများ၊

တရားရုံးတစ်ခုမှမပြည့်စုံသော သို့မဟုတ် မလုံလောက်သော ကုစားမှုများနှင့် တရားစီရင်ပိုင်ခွင့်ကို စိန်ခေါ်မှုများ စွာပြုလုပ်နိုင်သည့် အခွင့်အလမ်းများစွာ ရှိသည်။

သီးခြားနယ်စပ်ဖြတ်ကျော်အငြင်းပွားမှုများအတွက် သက်ဆိုင်ရာ ဩစတြေးလျ တရားရုံး၏ တရားစီရင်ပိုင်ခွင့်နှင့် ဩစတြေးလျ ပြင်ပ တရားရုံးများ၏ တရားစီရင်ပိုင်ခွင့်အကြား ထပ်နေမှုများ သို့မဟုတ် ကွာဟချက်များ ရှိနိုင်သည်။

ဩစတြေးလျ ပြင်ပရှိ တရားရုံးများ၏ တရားစီရင်ပိုင်ခွင့်ကို ၎င်းတို့ကိုယ်ပိုင် ဥပဒေစနစ်ဖြင့် ဆုံးဖြတ်လိမ့်မည်။

ခွဲခြမ်းစိတ်ဖြာမှုအတွက် အခြေခံတစ်ခုပေးရန် ဤအစီရင်ခံစာသည် ဩစတြေးလျ တရားစီရင်ပိုင်ခွင့်ဆိုင်ရာ တရားစီရင်ပိုင်ခွင့်ကို အခြေခံသည်။

Australian proceedings

6.6 Analytically, jurisdictional and related issues in Australian litigation can arise at several stages in Australian proceedings. For convenience, issues can be grouped around the issue of initiating process, service and challenge to jurisdiction.

6.7 Legal proceedings are commenced in Australia by the issue of an initiating process, such as a statement of claim or summons. This initiating process is filed with the court. Strictly, it is only effective if the court has jurisdiction to adjudicate the issues raised in the initiating process. The jurisdiction of the court to adjudicate those issues depends on a number of elements including

- whether the initiating process raises a cause of action which that court has jurisdiction to determine (eg breach of contract, negligence, breach of s 52 of the Trade Practices Act 1974 (Cth))
- whether the court has jurisdiction over the defendant
- whether the court has jurisdiction to grant the remedy sought.

- ဩစတြေးလျ နိုင်ငံတွင် တရားစွဲဆိုမှု သို့မဟုတ် ဆင့်ခေါ်ခြင်း စသည့် လုပ်ငန်းစဉ်များ စတင်သည့် ကိစ္စကို စတင်ခဲ့သည်။ ဤအစီအစဉ်ကို တရားရုံးသို့ တင်သွင်းသည်။
တင်းတင်းကျပ်ကျပ် ပြောရလျှင် တရားရုံးသည် အစပြုခြင်းတွင် ပေါ်ပေါက်လာသော ပြဿနာများကို တရားစီရင်ပိုင်ခွင့်ရှိမှသာ လျှင်ထိရောက်မှု ရှိသည်။

ထိုပြဿနာများကိုတရားစီရင်ရန်တရားရုံး၏စီရင်ပိုင်ခွင့်သည်ပါဝင်သည့်အချက်များပေါ်တွင်မူတည်သည်

- စတင်သည့်လုပ်ငန်းစဉ်သည်တရားရုံးတွင်ဆုံးဖြတ်ရန်တရားစီရင်ပိုင်ခွင့်ရှိသည့်အရေးယူမှုဖြစ်စေသည့်အကြောင်းအရင်းပေါ်ပေါက်စေခြင်းရှိမရှိ (ဥပမာ၊ ၁၉၇၄ ကုန်သွယ်မှုဆိုင်ရာဥပဒေအက်ဥပဒေ ၁၉၇၄ (Cth) ၏ ၅၂ ဥပဒေချိုးဖောက်မှု၊ ပေါ့ဆမှု၊ ပျက်ကွက်မှု))
- တရားရုံးကတရားခံအပေါ်တရားစီရင်ပိုင်ခွင့်ရှိမရှိ
- တရားရုံးတွင်ရှာသောကုစားမှုအတွက်တရားစီရင်ပိုင်ခွင့်ရှိမရှိ။

These jurisdictional issues are discussed in more detail later in this chapter.[cclxxxix] In practice they are not argued at the time that the initiating process is issued because neither the court nor the other parties examine them at that stage.

6.8 After the initiating process has been filed with the court it must be served on the other party or parties to the proceedings. Service outside the geographic jurisdiction of the court is only permitted in defined circumstances. In practice jurisdictional issues are sometimes raised at this stage. Often this occurs where the plaintiff seeks the leave of the court to serve outside the jurisdiction or seeks an order that informal service is effective. The court will wish to be satisfied at that stage that it has jurisdiction to adjudicate the claim raised by the initiating process. Service of process outside Australia is discussed later in this chapter.

6.9 The third milestone in Australian proceedings is when the defendant outside Australia first becomes aware of the Australian proceedings. At that stage the defendant has several options

- the defendant could choose not to come to Australia to defend the proceedings
- the defendant could make a conditional appearance in the Australian court, submitting to the court only for the purpose of challenging its jurisdiction;
- the defendant could appear in the Australian court to defend itself on both jurisdictional and substantive grounds
- the defendant could initiate counter proceedings in the foreign jurisdiction.

• သြစတြေးလျတရားစွဲဆိုမှု၏တတိယမှတ်တိုင်မှာသြစတြေးလျားပြင်ပမှတရားခံသည်သြစတြေးလျ၏တရားစွဲဆိုမှုကိုပထမဆုံးသတိပြုမိသောအချိန်ဖြစ်သည်။

အဲဒီအဆင့်မှာတရားခံအများအပြားရွေးချယ်စရာရှိပါတယ်

- တရားခံသည်တရားစွဲဆိုမှုအားခုခံကာကွယ်ရန်အတွက်သြစတြေးလျသို့မလာရန်ရွေးချယ်နိုင်သည်
- တရားခံသည်သြစတြေးလျတရားရုံးတွင်ခွင့်ချက်အနေဖြင့်ပြုလုပ်နိုင်ပြီးတရားစီရင်ပိုင်ခွင့်ကိုစိန်ခေါ်ရန်အတွက်သာတရားရုံးသို့တင်ပြရမည်။
- တရားခံသည်သြစတြေးလျတရားရုံးတွင်တရားစီရင်ပိုင်ခွင့်နှင့်ထိရောက်သောအကြောင်းရင်းနှစ်ရပ်စလုံးတွင်မိမိကိုယ်ကိုကာကွယ်ရန်ပေါ်လာနိုင်သည်

- တရားခံသည်နိုင်ငံခြားတရားစီရင်ပိုင်ခွင့်တွင်တရားစွဲဆိုမှုများကိုစတင်နိုင်သည်။

6.10 If the defendant chooses not to come to Australia to defend the proceedings this will put at risk any assets it has in Australia and its ability to visit or do business in Australia at a later date. At the same time, should the defendant choose not to appear in the proceedings the path to a remedy is not necessarily free of obstacles for a plaintiff. The plaintiff will need to take action in the defendant's jurisdiction, either by commencing entirely new proceedings or seeking recognition of Australian judgments. Even if the Australian judgment is recognised the foreign court may not grant the same form of relief. Recognition of foreign judgments, and the form of relief that will be granted, are discussed later in this chapter.

အကယ်၍တရားခံသည်တရားစွဲဆိုမှုများကိုခုခံကာကွယ်ရန်သြစတြေးလျသို့သို့မလာရန်ရွေးချယ်ပါက၎င်းသည်သြစတြေးလျရှိပိုင်ဆိုင်မှုများနှင့်နောက်လမည့်နေ့တွင်သြစတြေးလျသို့လာရောက်လည်ပတ်ခြင်းသို့မဟုတ်စီးပွားရေးလုပ်ငန်းစွမ်းရည်ကိုအန္တရာယ်ရှိစေသည်။

တစ်ချိန်တည်းမှာပင်တရားခံသည်တရားစွဲဆိုမှုများတွင်ပါဝင်ခြင်းမပြုရန်ရွေးချယ်ပါကကုစားမှုလမ်းကြောင်းသည်တရားလိုအနေဖြင့်အတားအဆီးများမှကင်းဝေးစေလိမ့်မည်မဟုတ်ပါ။

တရားလိုသည်တရားစွဲဆိုသူ၏တရားစီရင်ပိုင်ခွင့်တွင်အရေးယူမှုအသစ်များစတင်ခြင်းသို့မဟုတ်သြစတြေးလျတရားစီရင်ပိုင်ခွင့်အသိအမှတ်ပြုခြင်းအားဖြင့်အရေးယူရန်လိုအပ်လိမ့်မည်။

သြစတြေးလျ၏စီရင်ဆုံးဖြတ်မှုကိုအသိအမှတ်ပြုလျှင်ပင်နိုင်ငံခြားတရားရုံးသည်တူညီသောသက်သာခွင့်ကိုခွင့်မပြုပေ။

6.11 If the defendant chooses to challenge the jurisdiction of the Australian court, it can argue not only that the matter is beyond the power of the court but also that the court should, in its discretion, refuse to hear the matter on the ground that the Australian forum is clearly inappropriate (forum non conveniens).[cclxxxii] Another strategy open to the defendant (depending on the laws of its own jurisdiction) is to commence proceedings in its own jurisdiction seeking a remedy against the plaintiff by seeking an order from a court in its own jurisdiction prohibiting the plaintiff from continuing its proceedings in Australia (ie, an anti-suit injunction) or a favourable declaration which would negative any rights over property sought by the plaintiff in the Australian forum. The plaintiff can in turn counter this by seeking an anti-anti-suit injunction in Australia. Forum non conveniens and anti-suit injunctions are discussed later in this chapter.

Investigations and asset seizure

6.12 Frequently the most important and difficult aspects of obtaining an effective remedy in a cross border dispute are

- finding out whether the defendant has any assets and where they are located (or, if assets have been stolen, where they now are)
- making sure that those ascertained assets are not taken away or dissipated, and
- getting hold of the evidence that will demonstrate the validity of the claim.

Often this information and protection is needed before proceedings are commenced or at a very early stage in proceedings. If they are not available at that stage, then in practice the plaintiff will either be unable to obtain judgment or unable to obtain any payment or asset in satisfaction of the judgment.

6.13 The two most useful forms of relief available under Australian law to meet these problems are the Mareva injunction and the Anton Piller order. A Mareva injunction temporarily restrains dealings in the specified assets pending hearing of the claim. It can be accompanied by an order requiring disclosure of assets wherever situated.^[cclxxxiii] An Anton Piller order authorises a party to enter specified premises to search for and seize relevant assets pending hearing of the claim. Both of these orders are in the discretion of the court. They can be obtained quickly (that is, in a matter of hours) if the court is satisfied that it is appropriate to grant them. They are only available where proceedings have been commenced but in practice a short initiating process can be tendered to the court when applying for the order. Both orders are discussed in more detail in chapter 7.

6.14 Those orders help a plaintiff to prevent identified assets from being taken away or dissipated but may provide only limited assistance to actually identify relevant assets prior to judgment or liquidation. The reason for this is that courts, in considering identification orders, may take into account significant competing policy interests, particularly oppression and privacy concerns. The most relevant legal mechanisms for finding assets and evidence for private proceedings are discovery, letters of request and a liquidator's powers of investigation. Letters of request concerning the taking of evidence are discussed later in this chapter together with other foreign evidence issues. Discovery and investigations by liquidators are discussed briefly in chapter 4.

6.15 The circumstances that give rise to a cross border dispute sometimes also have regulatory or criminal implications. Various government agencies may undertake investigations and seek other legal redress, including police, corporate and securities regulators, and tax authorities. In addition there might be others involved in private enforcement such as receivers. The report is not directly concerned with these investigations and enforcement. However, they are discussed briefly in chapter 4.

Judicial assistance

6.16 **Aside from specific remedies, Australian courts also have a number of powers that can be used to assist the enforcement of remedies of Australian courts outside Australia. The most important of these powers is the letter of request' under which the Australian court asks the foreign court to grant relevant orders in the foreign jurisdiction. Letters of request may relate to enforcement or evidence.** Both types are discussed later in this chapter.

Jurisdiction

တိကျသောကုစားမှုများအပြင်သြစတြေးလျတရားရုံးများသည်သြစတြေးလျားပြင်ပရှိသြစတြေးလျတရားရုံးများ၏ကုစားမှုများကိုကူညီရာတွင်အသုံးပြုနိုင်သောအားများစွာရှိသည်။

ဤလုပ်ပိုင်ခွင့်အာဏာ၏အရေးအကြီးဆုံးအချက်မှာတောင်းဆိုချက်စာဖြစ်သည်။

သြစတြေးလျတရားရုံးမှနိုင်ငံခြားတရားရုံးအားနိုင်ငံခြားတရားစီရင်ပိုင်ခွင့်နှင့်သက်ဆိုင်သောအမိန့်များကိုပေးရန်တောင်းဆိုသည်။

တောင်းခံစာသည်ဘက်လိုက်မှုသို့မဟုတ်သက်သေအထောက်အထားများနှင့်သက်ဆိုင်နိုင်သည်။

Introduction

6.17 This section discusses the territorial limits to the jurisdiction of Australian courts. It first outlines the jurisdiction of the Federal Court of Australia and the New South Wales Supreme and District Courts. It then considers particular jurisdictional issues relating to the issue of initiating process. The final part of the section considers the implications for court orders of laws which have extra-territorial scope, using the Corporations Law as an illustration.

Supreme Court

6.18 The Supreme Court of New South Wales is a court of general jurisdiction. It is ultimately derived from the Third Charter of Justice issued in 1823 which gave the colony of New South Wales a Supreme Court of unlimited jurisdiction (within the realms of the colony) modelled on the superior courts at Westminster.[cclxxxiv] This position is preserved by the Supreme Court Act 1970 (NSW).[cclxxxv]

6.19 A superior court of general jurisdiction such as the Supreme Court of New South Wales cannot be deprived of remedial or geographic jurisdiction in its State except by express statutory words or implication[cclxxxvi] or where it can be shown that the relevant jurisdiction exists in some other court.[cclxxxvii]

6.20 The jurisdiction of the Supreme Court of New South Wales may be extended outside the territorial limits of the State by statute so long as

- the statute is for the peace order and good government' of the State, and
- the exercise of the jurisdiction is ultimately referable to the enforcement of the statute within the State.

6.21 In such cases decisions made by the Supreme Court in accordance with the terms of the statute will not be in excess of jurisdiction even if they involve consideration of matters outside the State.[ccxc] There must be a connection between the State and the circumstances said to be within the statute. However this only needs to be a remote and general connection.[ccxci] Consequently the New South Wales legislature is competent to make laws which operate extraterritorially including laws which make it an offence to commit a prohibited act outside the State provided there is in the prohibited act an element sufficiently connected with the State.[ccxcii]

6.22 There is nonetheless a general presumption that the legislation and laws of New South Wales are not intended to have extraterritorial effect and court jurisdiction is similarly limited.[ccxciii] Thus unless some statute specifically grants extraterritorial jurisdiction consistent with requirement for a connection with the State, the courts of the State have no jurisdiction to deal with matters occurring beyond the territorial limits.[ccxciv] This is subject to the further qualification to the presumption against extra-territorial jurisdiction that such a presumption will be rebutted if it would render ineffective the operation of the relevant statute.[ccxcv]

6.23 In geographic terms the sovereign and legislative territorial limit of each State in Australia extends beyond the land borders to the area between the low water mark and the 12 nautical mile territorial waters limit.[ccxcvi] This right in the States is subject to certain limitations, including the reservation of the right in the Commonwealth to use the sea bed for communications, defence and similar reasons. The State's legislative and sovereign power also extends beyond the territorial waters for certain limited purposes such as fisheries (by arrangement with the Commonwealth), ports and harbours. The territorial jurisdiction of the Supreme Court of New South Wales therefore extends to these offshore limits.

Federal Court

6.24 The Federal Court of Australia and its jurisdiction are derived from the Federal Court of Australia Act 1976 (Cth).[ccxcvii] The court has jurisdiction to deal with substantive matters that are

- within the power of Commonwealth Parliament as defined in the Constitution, and
- set out in the laws of the federal Parliament.

6.25 The Federal Court is not a court of general jurisdiction and is confined to the exercise of such powers as are either expressly conferred by statute, impliedly conferred by statute or linked and necessary to the exercise of these conferred powers.[ccc] Where the Federal Court is invested with jurisdiction to determine a particular matter it has jurisdiction to determine the entire proceedings. This applies even where the matter has common law elements or relates to certain State legislation, except where those elements can be severed from the proceedings and heard by the relevant State court.[ccci] The Federal Court also has implied incidental jurisdiction to hear matters that do not arise under laws of the federal Parliament but are related or similar to the matters that the federal Parliament has given the Federal Court jurisdiction to hear.[ccci]

6.26 The geographic limits of the Federal Court jurisdiction will depend on the terms of the statute granting the jurisdiction. The federal Parliament's capacity to make such legislation depends on its powers under the Constitution. Thus the Constitution is the ultimate determinant of the territorial limits to the jurisdiction of the Federal Court.

6.27 Several of the federal Parliament's powers under s 51 of the Constitution can be read as contemplating federal legislation applying outside Australia's boundaries. The two most obvious are the trade and commerce power (s 51(i)) [ccci] and the external affairs power (s 51(xxix)). Furthermore, since the Statute of Westminster 1931 (UK) and the Statute of Westminster Adoption Act 1942 (Cth), it is no objection to the validity of a law of the Commonwealth that it purports to operate outside Australia.[ccciv] Thus the federal Parliament has power to legislate for the settlement of industrial disputes extending outside Australia and the Federal Court has jurisdiction to hear such matters.[ccc]

6.28 Under the Acts Interpretation Act 1901 (Cth) all Acts of the federal Parliament are to be taken to have effect in and in relation to the territorial sea of Australia and in relation to the territorial sea surrounding any external territory of Australia.[cccvi]

District Court

6.29 The District Court of New South Wales is not a court of general jurisdiction and thus relies on the jurisdiction granted to it under the District Court Act 1973 (NSW) (District Court Act) and any other specific legislation.[ccc]

6.30 Pursuant to s 10 of the District Court Act the District Court of New South Wales is granted jurisdiction throughout the whole of the State. Under the Interpretation Act 1987 (NSW) the District Court (as well as all other State courts) is vested with jurisdiction in relation to all matters arising out of the laws of the State as if the coastal waters' of the State are within the limits of the State.[ccc]

The coastal waters' are the seas, seabed and sub-surface and the air above that sea, up to the 12 nautical mile offshore limit.[ccc]

The granting of jurisdiction throughout the whole of the State does not give the District Court the same general jurisdiction enjoyed by the Supreme Court to hear matters outside the territorial limits of the State.[ccc]

However it does not preclude the grant of extra-territorial jurisdiction to the District Court.[ccc]

Initiating process

6.31 In analytical terms the first jurisdictional issue to which these territorial limits apply is whether the court has jurisdiction to issue the initiating process against the defendant. The common law position needs to be considered separately from statutory effects.

6.32 At common law an action may not be commenced against an individual defendant unless that person is within the jurisdiction at the time of service of the initiating process (except in very special circumstances).[ccc]

It is irrelevant whether the individual is a foreigner, how long he or she is in the jurisdiction and for what reason he or she is in the

jurisdiction.[cccxi] The possession of assets in the jurisdiction by a potential defendant is also an irrelevant consideration.

6.33 In the case of a potential corporate defendant incorporated outside the jurisdiction, the common law position is that a process may only be issued against it if it has a presence in the jurisdiction. Presence is determined by whether the corporation is carrying on business in Australia. This concept is discussed in chapter 7.

6.34 A party can always submit to a jurisdiction by nominating a party within the jurisdiction on which process may be served or, in the case of a written agreement, by contracting to submit to the jurisdiction. Australian courts have capacity to enable an initiating process in these circumstances to be served out of the jurisdiction.[cccxi]

6.35 The common law position is substantially expanded for most Australian courts by their procedural rules. For example, the New South Wales Supreme and District Courts and the Federal Court of Australia all have criteria regarding jurisdiction which must be satisfied before any action may be commenced in those courts.[cccxi] In many respects these are not as strict as the common law requirement that the potential defendant must be within the jurisdiction at the time of service. All actions proposed to be commenced in any of these forums must satisfy these criteria.

6.36 Nonetheless, even where the plaintiff has a prima facie case for which the relevant Australian court has jurisdiction under these court rules, the relevant court retains the discretion to refuse leave to serve out of the jurisdiction or to deny leave to continue the proceedings.

- In jurisdictions where the plaintiff must apply for leave to serve the initiating process on the defendant out of the jurisdiction, such as the Federal Court, the onus is on the plaintiff to show that the case falls within one or more of the grounds upon which service out of the jurisdiction is permitted.
- In those jurisdictions where prior leave is not required, such as the Supreme Court of New South Wales, where the defendant does not appear within the requisite time the plaintiff must seek leave to proceed against the defendant.
- Jurisdiction obtained by service out of the jurisdiction and exercised upon persons outside the forum is an extreme jurisdiction which will be exercised with great caution.
- The plaintiff must make full and fair disclosure of all the relevant facts regarding the international aspects of the case. If it appears that the plaintiff has not done so, the court will refuse leave.
- In the exercise of its discretion the court will consider whether the forum is a clearly inappropriate place to try the action (forum non conveniens).

The procedures for effective service out of the jurisdiction (outside Australia) and forum non conveniens are both discussed later in this chapter.

Laws with extra-territorial scope

6.37 Some Australian legislation has extraterritorial application. Where an Australian court hears a claim arising under legislation of that kind it will have jurisdiction to make determinations about events and circumstances occurring outside Australia and to order remedies in respect of those events or circumstances. However its orders will only be enforceable within the territorial jurisdiction of the court. Thus the extraterritorial scope of the legislation will increase the scope of the evidence and issues to be considered by the court but, strictly, will not increase the territorial scope of the remedies available from the court.

6.38 This can be illustrated by the Corporations Law. Section 110D of the Corporations Law specifies that Chapters 1 to 6 and Chapter 9 of the Corporations Law apply to

- natural persons, whether resident in the State or Australia or not and whether Australian citizens or not

- all bodies corporate and unincorporated bodies whether formed or carrying on business in Australia or not, and
- acts and omissions outside the relevant State, whether in Australia or not.

6.39 This provision clearly empowers the Federal Court and State and Territory Supreme Courts to hear matters involving elements outside Australia in certain circumstances. The only qualification is that, as the Corporations Law is State legislation (except in relation to the internal territories), its extraterritorial scope will be limited by considerations of what is a law for the peace, order and good government of the State and whether the exercise of the jurisdiction is ultimately referable, however remotely, to the enforcement of the Corporations Law within the relevant State.

6.40 The effect of this extra-territorial scope can be illustrated by the financial benefits provisions in Part 3.2A of the Corporations Law. Section 243H(2) provides that a child entity of a public company must not give a financial benefit to a related party of the public company except as permitted by Division 4 or 5 of that Part of the Law. Thus the UK subsidiary of an Australian public company must not lend more than \$2 000 on terms which are not arms length (for example, interest free) to the UK resident daughter of one of the directors of the Australian public company. If it does so without prior disclosure and shareholder approval the UK resident daughter will have contravened s 243ZE(2) which is a civil penalty provision and attracts the civil and criminal consequences set out in Part 9.4B. The UK subsidiary will also be governed by UK companies law. It is therefore possible that the transaction will also give rise to a similar liability on the part of the UK resident daughter or the UK subsidiary (or both) in the UK.

6.41 In terms of legislative intention this result is fully consistent with the object of Part 3.2A which is to protect the Australian public company's resources, local and foreign, by requiring prior disclosure and shareholder approval of financial benefits to related parties that could diminish the resources of the public company. However in terms of its cross border implications, the result creates a number of difficulties for the Australian court. All of the relevant parties are in the UK. All of the evidence is likely to be in the UK. Any restitution to the UK subsidiary will need to be enforced in the UK. In addition the Australian proceedings may overlap with UK proceedings on the same matter.[cccix]

6.42 In summary where Australian laws have extraterritorial scope this clearly gives rise to greater potential for overlapping jurisdiction between the courts of Australia and courts outside Australia. There is also a potential mismatch between the claim that the Australian court can determine and the remedies the Australian court is able to order in relation to that claim.

[Service of process outside Australia](#)

[Introduction](#)

6.43 This section discusses the extent to which Australian courts will authorise or recognise service outside Australia. It considers general principles first, then forms of valid service and, finally, setting aside service of process outside Australia.

[General principles](#)

6.44 Where the party is in the jurisdiction service of an initiating process in any court in Australia is required to be in person.[cccxx] It is however sufficient that service be accomplished by putting down a copy in that person's presence and explaining its nature.[cccxxi] In the case of service on a corporation service may be effected either by serving the initiating process personally on two directors or by mailing it to the registered office.[cccxxii] In the case of a registered foreign company service may be effected by leaving it at, or sending it by post to, the registered office of the foreign corporation, the address of the local agent of the foreign company[cccxxiii] or that of any two directors

resident in Australia.[cccxxiv] The court however retains a jurisdiction to authorise service on a registered foreign company in any other manner it sees fit.[cccxxv]

6.45 Where the party is outside the jurisdiction, the analysis is more complicated. In each of the situations considered in chapters 7 and 8 the proceedings are required to be commenced by serving an initiating process out of an Australian court on a defendant located in a foreign country. Each of the methods of service described above is likely to be difficult to effect outside Australia. There can also be local legal restrictions. The rules of court in Australia take into account some of the logistical difficulties in effecting service in a foreign jurisdiction. These are outlined below.

Forms of valid service

6.46 **Substituted service.** In some situations personal service or service in accordance with the other requirements outlined above may be waived and an alternative form of service ordered by the court. Substituted service may be ordered where

- it is impracticable to serve the document in the required manner, and
- it is reasonably probable that the form of substituted service ordered by the Court will be effective to bring notice of the proceedings to the party to be served.

6.47 **Informal service.** Alternatively, a party attempting service in a foreign jurisdiction may seek an order from the court that the relevant initiating process has been served by virtue of informal service. In this case, if the court is satisfied that the service in the required manner was impracticable but steps have been taken to bring or will have the tendency to bring the contents of the document to the attention of the person to be served, the court will order that service has been effected.[cccxxvii]

6.48 **Service in accordance with the law of the foreign jurisdiction.** Where a document is required to be served outside Australia the document need not be served personally so long as the document is otherwise served in accordance with the laws of service applicable in the foreign jurisdiction in which service is to take place.[cccxxviii] It is not mandatory for service to be effected in accordance with the law of the country in which service is to take place. The validity of service is at all times to be judged in accordance with the relevant Act and Rules of the Australian court.[cccxxix] However where the method of service is not effective under the local law, this may affect the recognition of the Australian judgment in that jurisdiction.

6.49 **Service in Convention countries.** Australia has acceded to a number of conventions relating to legal proceedings in civil and commercial matters.[cccxxx] In the case of service in countries that are party to these conventions (and in the case of the Supreme Court of New South Wales, any other country the Attorney General by instrument filed in the proceedings may direct) a special procedure for service exists. In such cases a person wishing to serve documents in the convention country may apply to the Prothonotary or the Registrar (as appropriate) of the relevant court in Australia for approval to

- seal and send documents requiring service to the convention country, and
- provide an appropriate letter of request addressed to the appropriate court in the country in which service is sought (as required).

Service in this manner would be effected through the Secretary of the Attorney-General's Department and then through official channels in the convention country. A certificate from a judicial authority or other responsible person in the relevant convention country that service has been effected in this manner will be evidence of the service or attempted service taking place. Before the Prothonotary or Registrar is able to undertake this process the party seeking service must ensure that a translation of the documentation is also supplied and served where the country for service does not have English as its official language.[cccxxxii] The party must also give an undertaking to pay all the costs of the Prothonotary's or Registrar's request for service.[cccxxxiii] If service is not attempted

through this official channel then, unless the law of the convention country otherwise requires, there is no requirement to serve a translation.[cccxxxiv]

6.50 **Service in non-convention countries.** The Federal Court also has an additional procedure which may be used to implement service in a non-convention country.[cccxxxv] A party seeking extra-territorial service in this manner must file a request form with the Federal Court and supply a translation of the document to be served. The Federal Court must then seal the documents with a special seal for extra-territorial service and forward the documentation and a formal request to the Secretary of the Attorney-General's Department for transmission to the government of the relevant country. Service is proved by the transmission of a certificate from the relevant court or government of the country in which service is to take place, certifying that service has taken place either personally or in accordance with the rules for service in that country.

Setting aside service of process outside Australia

6.51 The courts in Australia retain an overriding discretion to set aside an originating process on a variety of grounds. This is a flexible discretion able to be exercised having regard to all the circumstances of the case.[cccxxxvi]

6.52 One of the principal circumstances in which the court will exercise this discretion is where a document has not been served in a proper manner.[cccxxxvii] The considerations that the court will take into account include whether the plaintiff has an arguable case on the merits[cccxxxviii] and the basis on which authority to serve the initiating process outside Australia is maintained by the serving party.[cccxxxix]

6.53 Generally Australian courts have a discretion to disregard irregularities in service. The traditional view was that any irregularity in service outside the jurisdiction should only be disregarded in exceptional circumstances.[cccxl] However more recent case law suggests that an irregularity going to the mode of service will be more easily waived than an irregularity that has an impact on the positions of the parties if the proceedings are permitted to proceed.[cccxli] In practice service has not been set aside even where the irregularity is quite substantial, for example writs for service on separate defendants being served on the wrong defendants or no writ being served but rather a form of acknowledgment of service being served.[cccxl ii]

6.54 Other factors considered by the courts are

- whether the proceedings would subsequently be stayed as an abuse of process on the basis that Australia was a clearly inappropriate forum (forum non conveniens) or for some other reason, and
- whether the serving party would not otherwise be able to pursue an action in the foreign court.

Challenging jurisdiction

Introduction

6.55 This section discusses the discretionary grounds on which a court can stay proceedings in Australia or seek to prevent parallel proceedings outside Australia. If a claim is outside the jurisdiction of an Australian court the defendant can require the court to strike out the claim and terminate the proceedings. There is no discretion involved. But even where the court does have jurisdiction the defendant can ask the court to exercise its discretion to stay the proceedings on the ground that the forum is clearly inappropriate. The court may also, in its discretion, grant an anti-suit injunction to prevent parallel proceedings outside Australia.

Forum non conveniens

6.56 In any Australian proceedings the defendant may request the court to grant a stay of the proceedings on the basis that the trial in Australia is clearly inappropriate because the

matter has little to do with the local forum (*forum non conveniens*). However in Australia it is difficult for a defendant to obtain a stay on this basis. It will only be granted where the defendant demonstrates that

- the local court is such an inappropriate forum that continuation of the proceedings there would be oppressive to the defendant, or
- having regard to the circumstances of the particular case and the availability of the foreign forum, the local forum is clearly an inappropriate forum for the determination of the matter.

Generally this will only be demonstrated if the defendant can identify an appropriate foreign tribunal to whose jurisdiction it is amenable and which would entertain the particular proceedings at the instigation of the plaintiff, and can show that the Australian court is so clearly an inappropriate forum that the continuation of the matter in the Australian court would be oppressive to the defendant.

Anti-suit injunctions

6.57 A second order available from the Australian courts where proceedings have been brought in another jurisdiction for the same cause of action is the anti-suit injunction. Where such an order is granted it operates to restrain the parties from pursuing the concurrent foreign proceedings. Although the injunction is only enforceable against the parties, it is usually effective to restrain the matter from proceeding in the foreign forum.[cccxlvi] Australian courts will only make such an order in special circumstances where the applicant for the injunction can demonstrate that there is a strong need for restraint of proceedings in the other jurisdiction to protect the integrity and processes of the local court from interference by the foreign court.[cccxlvi] In all cases the Australian courts will only make such an order with great caution and with an eye to the possibility of overreaching their jurisdiction particularly where the proceedings restrained in a foreign jurisdiction involve a national or resident of that jurisdiction.[cccxlvi]

Enforcement outside Australia

Introduction

6.58 Australian officials cannot enforce unilaterally the judgments of Australian courts outside Australia. To do so would breach the sovereignty of other countries. In recognition of this, Australian law includes some mechanisms to assist in enforcement outside Australia and to encourage international cooperation in enforcement proceedings. The principal mechanisms are letters of request and reciprocal recognition of judgments. These are outlined below. The forms of relief available when enforcing outside Australia will nonetheless be determined by the foreign court. This is also discussed below.

Letters of request

6.59 Australian courts are able to issue letters of request both in bankruptcy proceedings and in relation to corporate insolvency and external administration under the Corporations Law.

6.60 Under the Bankruptcy Act a court of relevant jurisdiction in bankruptcy in Australia may seek the assistance of competent courts in a foreign jurisdiction in matters of bankruptcy. The assistance of such competent courts of foreign jurisdiction may be obtained by way of a letter of request from the relevant Australian court.[cccxlvi]

6.61 In order for the relevant Australian court to issue such a letter of request the court must first be satisfied that the foreign court to which the request is to be addressed has jurisdiction in bankruptcy to act in aid of and be auxiliary to the Australian court in a matter of bankruptcy.[cccxlvi] If the relevant Australian court is of the opinion that the court of the foreign jurisdiction does not have power to act on the request it will not issue the

request.[cccli] This will necessarily involve the court examining the jurisdictional capacity of the foreign court to deal with the areas the subject of the request.

6.62 The relevant Australian court retains an overall discretion whether to make the request or not.[ccclii] The discretion is to be exercised with regard to considerations of utility and comity.[cccliii] Other considerations such as inconvenience to parties and the possibility of increased costs are relevant if, for example, it is possible and reasonable in the circumstances for the trustee in bankruptcy to take out proceedings in the foreign court directly.

6.63 The actual request usually takes the form of a letter to the justices of the relevant foreign court which

- outlines the nature of the proceedings
- indicates the nature of the entitlement to the property located within the foreign jurisdiction
- outlines the grounds on which it has been represented to the issuing court that the property should be dealt with in accordance with the laws of the issuing court
- requests that the foreign court vest the identified property of the bankrupt in the trustee appointed in the jurisdiction of the issuing court and grant orders sought by the trustee for the purposes of implementing its rights as trustee in bankruptcy.

6.64 It is not necessary for a treaty to exist to ground the jurisdiction of the court to issue a letter of request to a foreign jurisdiction.[ccclv] The request may relate to either real or personal property owned by the bankrupt.[ccclvi]

Corporations Law

6.65 The position in relation to requests directed to courts of foreign jurisdiction in bankruptcy matters is also mirrored in relation to corporate insolvency and external administration matters. Under s 581(4) of the Corporations Law a court of relevant jurisdiction in Australia can request a court of another country which has jurisdiction in matters relating to the external administration of companies to act in aid of the Australian court in external administration matters. An external administration matter' is defined in s 580 and includes the winding up of an Australian or foreign company either in Australia or overseas.

6.66 This power is exercised on a similar basis to the power to issue letters of request in bankruptcy proceedings. The issuing court will need to be satisfied that the foreign court has jurisdiction and capacity to act on the request in relation to external administration. The same considerations of utility, comity, convenience and cost will be taken into account in the exercise of the court's discretion.

6.67 As in the case of the bankruptcy letter of request, the actual request usually takes the form of a letter to the justices of the foreign court which

- outlines the nature of the proceedings
- indicates the nature of the entitlement to the property located within the foreign jurisdiction
- outlines the grounds on which it has been represented to the issuing court that the property should be dealt with in accordance with the laws of the issuing court
- suggests the possible orders that could be made by the foreign court to assist the Australian court in administration of the winding-up process.

Reciprocal recognition of judgments

6.68 One of the principal mechanisms for international cooperation in enforcement proceedings is reciprocal recognition of judgments. Under Australian law foreign judgments will be recognised and enforced in Australia if they fall within the category of judgments recognised under the Foreign Judgments Act or if they otherwise qualify for

recognition under the common law. This section concentrates on recognition provided in the Foreign Judgments Act.

6.69 The Foreign Judgments Act provides a framework for enforcement of foreign money judgments in Australia based on assurances that the foreign jurisdictions to which the Act applies will substantially reciprocate in the enforcement of judgments of the Australian Supreme and Federal Courts.[ccclviii] Under the Act, a mandatory procedure is established for the relevant Australian court to register and enforce money judgments of foreign courts to which the Act is proclaimed to apply. Non-money judgments such as injunctions are within the scope of the Act but have not yet been prescribed in the regulations in relation to any of the reciprocating foreign jurisdictions.

6.70 The foreign countries and courts to which the Act applies are set out in regulations. Of the foreign jurisdictions set out for the Commission's attention in the terms of reference only the Cook Islands, Switzerland and Germany have been made the subject of the Foreign Judgments Act.[ccclix] If the Act is not proclaimed to apply to a particular foreign jurisdiction then enforcement of the foreign money judgment in Australia is to be conducted at common law, requiring the judgment debtor to be served in or having submitted to the jurisdiction of the enforcing court in Australia.[ccclx]

6.71 A foreign jurisdiction is only entitled to receive the benefit of recognition of its money judgments in Australian courts under the Foreign Judgments Act where the Governor-General is satisfied that substantial reciprocity of treatment is assured in respect of enforcement of money judgments of Australian courts.[ccclxi] This is not a strict enforcement obligation on the part of the relevant foreign jurisdictions. The Foreign Judgments Act merely empowers the Governor-General to remove the recognition of the relevant foreign money judgments if it becomes apparent that the enforcement of Australian money judgments accorded by the relevant foreign jurisdiction is substantially less favourable than that afforded by the Australian courts.[ccclxii]

6.72 To implement the reciprocal recognition of judgments the Act sets out a procedure to facilitate the enforcement of Australian money judgments outside Australia. Thus, under the Foreign Judgments Act, on application by a judgment creditor an Australian court is required to provide

- a certified copy of a judgment, and
 - a certificate containing particulars with respect to the causes of action and rate of interest payable on the sum payable under the judgment,
- in order that the judgment creditor may attempt to enforce that judgment outside the jurisdiction.[ccclxiii]

6.73 The certificate and certified copy of judgment will only be provided where the judgment creditor is seeking to enforce the judgment in one of the foreign jurisdictions to which the Act applies.[ccclxiv] The procedure is not available in the District Court (except by way of issue through the Supreme Court after an application to have the matter transferred to the Supreme Court) but a similar procedure is available in the Federal Court.[ccclxv] In all other cases the judgment creditor has to rely on the certified judgment obtained from the relevant court.

6.74 The court will not make orders for execution of any levy, sequestration, attachment or garnishee process or for enforcement of the judgment where the execution is to be conducted outside the jurisdiction.[ccclxvi] Similarly while upon delivery of a writ the sheriff acquires a legal right to seize the goods specified in the writ,[ccclxvii] a sheriff cannot seize and sell property out of the jurisdiction of the court.[ccclxviii]

Form of relief

6.75 Regardless of the judicial or statutory assistance available, in any enforcement proceedings taken outside Australia a party attempting to enforce an Australian right can

only obtain relief in the form and manner which the forum in the foreign jurisdiction provides.[ccclxix] The ultimate remedy obtained by a party in a foreign jurisdiction may therefore be more or less than would have been obtained if the action were confined to a cause of action arising solely within Australia.

6.76 The foreign forum may also enforce a relevant Australian right by means of a remedy that was not otherwise available to the party in Australia.[ccclxx] Alternatively, the remedy allowed by the Australian court may not be recognised in the foreign jurisdiction and the foreign court may grant an alternative remedy. The degree to which the foreign court will modify the remedy will depend on the mechanisms for enforcement available in the foreign jurisdiction and how closely the remedies from the two jurisdictions compare. The foreign court may decide that the relevant Australian remedy is too different from any available in its own jurisdiction to permit enforcement at all.[ccclxxi]

6.77 In enforcement proceedings in a foreign jurisdiction the law of the foreign jurisdiction not only determines how enforcement is to take place but also by which property the judgment is to be satisfied.[ccclxxii] The law of the foreign jurisdiction will also determine priorities of creditors. However a court in the foreign jurisdiction would not be expected to apply a rule of its own domestic law that operates to protect a party from liability where the relevant law of Australia applied in the Australian judgment imposes such a liability.[ccclxxiii]

Foreign evidence

Collecting evidence outside Australia

6.78 Disputes with a cross border element will invariably require evidence to be collected outside Australia. If the person outside Australia who has that evidence does not wish to give it, a court order will be needed to compel the person to do so. However, strictly, Australian courts can only compel evidence to be given within Australia and its territories. There are two mechanisms which address this difficulty: letters of request and certain mutual assistance powers.

6.79 Section 7(1) of the Foreign Evidence Act empowers the courts to make certain orders relating to the giving of evidence by a person outside Australia. If it appears in the interests of justice to do so, the court may order (in broad terms)

- the examination of a person outside Australia before a judge, court officer or other nominated person
- the issue of a commission for the examination of a person outside Australia
- the issue of a letter of request to the judicial authorities of a foreign country to take the evidence of a person or cause it to be taken.

The letter of request will be the most useful procedure if the person outside Australia does not wish to give evidence since it can lead to appropriate compelling orders from a court with jurisdiction over that person.

6.80 The Attorney-General has power under the Mutual Assistance in Criminal Matters Act 1987 (Cth) to arrange for evidence to be taken in a foreign country, or for documents or other articles in a foreign country to be produced, for the purpose of a proceeding in relation to a criminal matter in Australia. However it is unlikely that an Australian court would compel any foreign evidence collected in this manner to be produced in a civil proceeding, regardless of its relevance, since it will usually only have been provided on the basis that it will only be used in relation to the relevant criminal proceeding.[ccclxxiv]

6.81 The Australian Securities Commission has also established arrangements giving it access to foreign evidence through memoranda of understanding with its counterpart regulators in various other jurisdictions, including UK, Hong Kong, New Zealand, USA and France. These arrangements are given statutory support in the Foreign Evidence Act 1994 (Cth) (Foreign Evidence Act). However, it is unlikely that an Australian court would

compel production by the ASC to a party in a separate civil proceeding of evidence the ASC collected under these arrangements where that party could not use an Australian court to obtain the evidence from its original owners or holders and the documents are subject to a restricted use undertaking.[ccclxxv]

Documentary evidence

6.82 It appears that under the Foreign Evidence Act letters of request cannot be issued for the purpose of obtaining only documentary evidence, unattached to a record of oral testimony. At the same time Australian courts do have the power to order production of documents alone in response to a letter of request from a foreign court. Concern has been expressed that if this interpretation of the Act is correct, it is anomalous and would prevent much evidence being obtained that is needed for commercial matters, particularly from corporations.[ccclxxvi]