

COMMERCIAL DISPUTES:
CHOOSING THE CORRECT JURISDICTION

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DANIEL AGHION
Barrister

Ph: (03) 9225 7092
Fax: (03) 9225 8025
Mob: 0412 54 7092

Latham Chambers
Room 29, 11th floor
500 Bourke Street
Melbourne

Mailing address:
C/- Gordon & Jackson
Owen Dixon Chambers
205 William Street
MELBOURNE VIC 3000
DX 94 Melbourne
aghion@vicbar.com.au

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STATE COURTS

Supreme Court

- Unless expressly excluded by statute, the Supreme Court has unlimited jurisdiction over all matters in or in relation to Victoria (*Constitution Act 1975*, s85).
- Order 7 of the *Supreme Court (General Civil Procedure) Rules* extends the reach of the Supreme Court by permitting service out of Australia.
- Even if the defendant resides overseas, the tort or breach of contract occurred overseas, and foreign law must be applied, a proceeding could still arguably be brought as long as the plaintiff resides in Victoria (see: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491). The problem in such cases might be one of enforcing the judgment.
- The ‘costs penalty’ rule means that it would be unwise to bring a claim in the Supreme Court where the value of the claim is less than \$100,000 (or \$50,000 for defamation proceedings) see r63.24, 63.25. This is always subject to the proviso that costs are ultimately in the discretion of the Court and there may, on occasion, be cogent reasons why a proceeding ought be issued out of the Supreme Court and not elsewhere.

- The Supreme Court is broken down into the following divisions and specialist lists:
 - Commercial and Equity Division
 - Admiralty List
 - Building Cases List
 - Commercial List
 - Intellectual Property List
 - Taxation List
 - Common Law Division
 - Major Torts List
 - Valuation, Compensation and Planning List
 - Criminal Division

- Keep in mind that, although it is necessary to enter a case into a particular division, it is not necessary to enter it into a specialist list within that division. The allocation of work between the various divisions is set out in Annexure A to *Practice Note No 4 of 1999* [1999] 2 VR 293.

- The Guide to Commercial List Procedure is currently being rewritten. Once it is republished, practitioners should obtain a copy from the Prothonotary's office. The Commercial List requires particular care and attention to procedural requirements such as timelines, etc. Generally speaking, the Commercial List is only for well-resourced litigants.

County Court

- The County Court is a court of limited jurisdiction, created by statute (*County Court Act 1958*). It can hear both claims at law and in equity (*Supreme Court Act 1986*, s31). The maximum jurisdictional limit for civil cases not involving damages in respect of personal injury is \$200,000 (*County Court Act 1958*, s3). The limit can be waived if the parties consent to do so.
- The jurisdictional limit is determined by the amount sought to be recovered or, where title is sought to be affected, by the value of the property at the time of commencement of the proceeding. The ‘cost penalty’ rule will apply to claims where the amount sought to be recovered is less than \$25,000.
- The Registrar of the County Court maintains the following Court Lists for the civil division of the Court:
 - Damages List
 - General Division
 - Defamation Division
 - Damages (Medical) Division
 - Damages (Applications) Division
 - Damages (Serious Injury) Division
 - Business List
 - Commercial Division
 - Building Cases Division
 - Miscellaneous Division
 - WorkCover List
 - Long Cases List

- The type of work that is covered by each list and division can be found in O34A of the *County Court Rules of Procedure in Civil Proceedings 1989*. Unlike the Supreme Court, all proceedings must be entered into both a list and, if applicable, a division (r34A.09).

Magistrates' Court

- The Magistrates' Court is also a court of limited jurisdiction. It can hear:
 - claims for damages or a debt or a liquidated demand within the jurisdictional limit;
 - claims for equitable relief if the value of the relief is within the jurisdictional limit; and
 - causes of action where jurisdiction is conferred by another Act
(*Magistrates' Court Act 1989*, s100(1))
- The jurisdictional limit is \$40,000. It can be waived if the parties consent to the waiver. A claim for to enforce the terms of a charge over real property, given as security for a debt within the jurisdictional limit, is in fact a claim for equitable relief the value of which is represented by the value of the charged property
(*Crane Distribution Ltd v O'Loughlin* [2000] VSC 373).

Features of issuing a commercial dispute in the State Courts

- Availability of formalised procedures.
- Lack of individualised case management process.

- Delay in getting to trial.
- Mediation will be ordered, but the conduct of the mediation is not controlled.
- Costs generally follow the event, subject to the Court's discretion to order otherwise.

VCAT

General

- The Tribunal has two jurisdictions: original jurisdiction and review jurisdiction (*Victorian Civil and Administrative Tribunal Act 1998*), s40. A specific right must be conferred by a statute in order for VCAT to be able to hear a matter.
- The Tribunal operates in three divisions: administrative, civil and human rights.
- The civil division is comprised of the following lists:
 - civil claims list
 - credit list
 - domestic building list
 - real property list
 - residential tenancies list
 - retail tenancies list
- The functions of the various Lists are set out in Schedule 1 of the *VCAT Rules 1998*. Essentially, they are the functions allocated to the Tribunal under the various enactments set out in the Schedule.

Civil Claims List

- The core of the Civil Claims List's operations is the *Fair Trading Act 1999*. The *FTA* confers on the Tribunal the following powers:
 - where a person suffers loss, injury or damage because of a contravention of the *FTA*, the right to bring a proceeding to recover the amount of that loss, injury or damage against any person involved in the proceeding (*FTA*, s159);
 - the right to hear and determine a 'consumer and trader dispute' (*FTA*, s107).
- The former permits actions for misleading and deceptive conduct and other contraventions of the *FTA* to be brought before the Tribunal.
- The latter permits actions to be brought in relation to a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services, in relation to a supply or possible supply of goods or services (*FTA*, s107(1)). There is no monetary limit upon the Tribunal's jurisdiction. The Tribunal has broad remedial powers, which are set out in s108 of the *FTA*.
- In addition, in a trader-trader dispute that does not exceed \$10,000 or in a consumer dispute, VCAT "*may make any order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice*" (*FTA*, s109(1) & (4)).

- Once a consumer and trader dispute has been issued at VCAT, the Tribunal has exclusive jurisdiction over all of this issues in the dispute (*FTA*, s111(1)). By comparison, if a consumer and trader dispute is issued in a court, a party may apply for a stay if the proceeding could be heard by the Tribunal and the court is satisfied that the proceeding would be more appropriately be dealt with by the Tribunal (*FTA*, s112).
- In theory, there is no reason why many disputes of an ostensibly commercial nature could not be brought in the Civil Claims List of VCAT. There may be distinct tactical advantages in doing so in certain cases.
- The Civil Claims List can also hear disputes arising under the *Domestic Building Contracts Act 1995*, the *Motor Car Traders Act 1986*, and the *Small Claims Act 1973*.

Domestic Building List

- This List deals with domestic building disputes. These are defined by s54 of the *Domestic Building Contracts Act 1995*. The Tribunal's jurisdiction over domestic building disputes is not exclusive but can be made so by an application under s57 of the *DBC Act* to stay a proceeding issued elsewhere. Unlike the stay power granted to courts in consumer and trader disputes (see above), the court must grant a stay if the proceeding can be determined by VCAT, and has no discretion to order otherwise. There are many instances of embarrassed practitioners getting caught out by a s57 stay application being brought on the eve of trial.

- VCAT has traditionally taken an expansive view of its jurisdiction over domestic building disputes. Section 54 of the *DBCA* has been interpreted as giving the Tribunal power over such things as multi-storey residential constructions, conversions from office blocks to residential use, construction of serviced apartments (*Maclaw No 651 Ltd v HIH Casualty and General Insurance Ltd* [1999] VCAT 24), and preliminary site works on a housing estate (*Mt Holden Estates Pty Ltd v Lanigan Baldwin* [2003] VCAT 937).
- The Domestic Building List can also hear disputes arising under the *Fair Trading Act 1999*.

Real Property List

- As with all other Lists at VCAT, jurisdiction must be specifically conferred by statute. Of particular interest is the exclusive jurisdiction granted to hear and determine disputes arising out of the flow of water (*Water Act 1994*, s17; see *Coles Myer Ltd v City West Water* [1998] VSC 63).

Retail Tenancies List

- This List hears claims arising under the *Retail Leases Act 2003*, the *Retail Tenancies Reform Act 1998*, and the *Fair Trading Act 1999*.

- Jurisdiction is conferred upon the Tribunal to hear and determine an application for resolution of a retail tenancy dispute (*RLA*, s89). Apart from claims for relief against forfeiture or for unconscionable conduct, the jurisdiction is exclusive (*RLA*, s89(4)).
- A ‘retail tenancy dispute’ is a dispute arising under or in relation to a retail premises lease, except for a dispute relating solely to payment of rent (*RLA*, s81). A retail premises lease is a lease of premises, or part of premises, that are used wholly or predominantly for the sale or hire of goods or the retail provision of services (*RLA*, s4(1)). Leases where the ‘occupancy cost’ is greater than \$1,000,000 are not ‘retail premises leases’ (*RLA*, s4(2) & reg.6).

Features of issuing a commercial dispute at VCAT

- If issuing at VCAT, some thought should be given as to which is the appropriate List, and what actions are pleaded. For example, a small building dispute can be issued in the Civil Claims List, while a proceeding in the Retail Tenancies List could be both a retail tenancy dispute under the *Retail Leases Act 2003* and a consumer and trader dispute under the *Fair Trading Act 1999* (see *Zeus and Ra Pty Ltd v Nicolaou* (2003) 6 VR 606).
- The Tribunal is not a ‘court’ and therefore has no power in relation to claims brought under the *Trade Practices Act 1974* (Cth) (*Maltall v Bevendale* (1998) 14 VAR 368).

- Procedures are generally informal, although this varies from list to list. The Civil Claims List adopts a far more informal approach than the Domestic Building or Retail Tenancies Lists.
- Highly individualised case management is provided, with each case receiving its own directions hearings.
- Delay in getting to hearing is small, and is essentially dependent upon the complexity of the case itself and the pre-trial procedures. ‘Small claims’ can be heard and determined in less than 6 weeks.
- Mediation is an integral part of the process. Mediators and mediation facilities are provided by VCAT without charge. Compulsory conferences (a form of conciliation, facilitated by a Tribunal member – see *VCAT Act*, s83) are often ordered. There can be a tendency to ‘over-mediate’, particularly in the Domestic Building List.
- Each party must bear their own costs unless otherwise ordered. Costs are not awarded unless it is ‘fair’ to do so (*VCAT Act*, s109). Costs are commonly awarded in more complex commercial matters in the *Domestic Building List* and the *Real Property List* (see *Poole v Plumbing Industry Commission* [2002] VCAT 1363, *Lewis v Threadwell* [2004] VCAT 750). Costs orders are less common in the Civil Claims List. Costs in the Retail Tenancies List are subject to the specific provisions set out in s92 of the *RLA*: costs may not be awarded unless a party has been held to have acted vexatiously or has refused to take part in mediation.

- There is no scale applicable to the quantum of any costs awarded. While it is conventional to use the relevant court scale for the amount of money in dispute, the convention is by no means universally applied.

FEDERAL COURTS

Federal Court

- The Federal Court has such jurisdiction as is vested in it by the laws made by the Commonwealth Parliament (*Federal Court of Australia Act 1976 (Cth)*, s19(2)). For the purposes of commercial disputes, this is essentially the *Trade Practices Act 1974 (Cth)*.
- Where the Federal Court has jurisdiction over one element of a dispute, it will also have jurisdiction accrued to it over the whole of the dispute, including elements that must be determined pursuant to common law or state legislation. The test is whether the other parts of the dispute arise out of the “same substratum of facts” (*Moorgate Tobacco Ltd v Philip Morris Ltd* (1980) 145 CLR 457).
- The effect of the above is that a claim that would otherwise fall within the exclusive or primary jurisdiction of a state instrumentality (e.g. a domestic building dispute in the Domestic Building List at VCAT; a consumer and trader dispute in the Civil Claims List at VCAT; a retail tenancy dispute in the Retail Tenancies List at VCAT) could arguably be brought in the Federal Court as a method of avoiding the ‘exclusive’ nature of the jurisdiction conferred by the

Victorian Parliament, if the facts disclose a claim under the *Trade Practices Act 1974*. An example would be a domestic building dispute involving contractual delay, where the principal pleads that the builder misrepresented the true length of time required to complete the building works. For a detailed analysis of this argument, see Phipps FM, *Courts, Federal Jurisdiction, and Building Cases*, (2001) 5 BDPS News 5.

- Claims seeking damages of less than \$100,000 should properly be brought in the relevant State Court, or in the Federal Magistrates' Court. There is a risk that the costs of a claim for less than this amount might be reduced by one-third, in the discretion of the Court (*Federal Court Rules*, O62r36A). In recent times, the Federal Court has been active in transferring less complex matters to the Federal Magistrates' Court.

Federal Magistrates' Court

- The FMC has jurisdiction over claims under Divisions 1 and 1A of Part V of the *Trade Practices Act*, to a maximum limit of \$200,000. Like the Federal Court, it has jurisdiction over associated matters (see *Federal Magistrates' Act 1999*, s18), and the argument set out above in relation to the Federal Court ought to apply equally to the FMC. Available remedies include injunctions, damages under s82 of the *TPA* and extended orders under s87 of the *TPA*.
- In proceedings before it, the Federal Magistrates Court must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted (*FMA*, s42). Pleadings need not be filed in order to initiate an

application (*FMA*, s50). Interrogatories and discovery are not permitted unless it is considered to be appropriate in the interests of justice (*FMA*, s45).

Features of issuing a commercial dispute in the Federal Courts

- There are vast practical differences between the two Courts. The Federal Court procedures are more streamlined than those of the Supreme and County Courts, but still formal. The Federal Magistrates' Court procedures are quite different, and are more suited to family law disputes. For example, in order to issue a proceeding in the FMC, the Rules require an application supported by an affidavit, to which the respondent files a response, also supported by an affidavit (*Federal Magistrates' Court Rules 2001*, Part 4). The FMC Registry will, however, accept an application supported by a pleading instead of an affidavit, or on occasion, an application alone. The need for pleadings and other interlocutory processes is then determined at a directions hearing known as the "first court date" (*Rules*, Part 10, Division 10.1). It is recommended that in the FMC, the first court date be used as a vehicle to establish more appropriate procedures for a commercial dispute than those contained within the Rules.
- A 'docket system' applies in the Federal Court, with each case being assigned to a docket judge, and managed by that judge to trial. This allows for continuity of case management, which is of particular advantage in complex cases. The Federal Magistrates' Court provides individualised directions moulded for each case on a 'modified docket system', under which further trial directions ought not be made without reference to the Magistrate who last had contact with the

matter (*Federal Magistrates Court Rules: Summary of provisions for general federal law jurisdictions* [96-7]). A full docket system is probably unnecessary, as the FMC procedure is to make all interlocutory orders at the first court date, including fixing a hearing date (*Rules*, Part 10, r10.03; *Summary*, [87]).

- Getting to trial in the Federal Court, at present, seems to be faster than in the County or Supreme Courts. The Federal Magistrates' Court can be very quick.
- Mediation is actively encouraged in both Courts. If a mediator can not be agreed upon, then a Court Registrar will be appointed to act as mediator. The FMC has the power to order mediation or conciliation, with or without consent, or arbitration with consent (*FMA*, ss 26, 34, 35).
- Costs generally follow the event in either Court, subject to the Court's discretion to order otherwise. The FMC will award costs in a lump sum according to the stage that the proceeding has reached, and will not award costs to be taxed in the normal manner, unless there is a specific reason to depart from the lump sum awards (see *FMR*, Part 21, Division 21.3; *FMR*, Schedule 1). The lump sums are reasonably generous, but there would appear to be no entitlement to a sum for counsel's fees without a certification for counsel as advocate (*FMR*, r21.15-16).