

LAW550 Litigation Weekly Readings

Civil Procedure Text Preface ppxxvi-xxxiv, Chapter 1 pp2-6, 14-29 and 32-56.

Chapter 1: Introduction to Civil Procedure

- Civil procedure: body of law governing litigation between 2 private parties
 - can involve gov orgs
 - States can be a party in civil litigation, especially if the State has been ta customer in a contract as was seen in JL v Holdings
 - = usually does not involve cases where the Crown is prosecuting an individual for breaching the law (criminal cases)
- What is procedure?
 - substantive law: relates to the substance of the claim, being the issues in dispute
 - = such as the law of contract, tort, land law, family law and IP law
 - procedural law: governs where and how the claim is to be heard
 - = civil procedure legislation, court rules, law of evidence, legal profession rules
 - the grey area included between these is when a claim can be made and under what circumstances
 - = such issues arise if the law has changed between the time of the dispute arising and the time of the hearing
 - = these questions affect the time limit or preconditions required for making a claim
 - Taylor v QLSA 2011:
 - = P's solicitor misappropriated her funds
 - = breach occurred in August 2003
 - = old LPA 2004 replaced with LPA 2007
 - = QLSA law governed access to shared pool of funds for victims like Taylor
 - = judge found claim to be heard under LPA 2007
 - ~ the P must take the court as they find them and not expect the court to do functions as one in another jurisdiction where the wrong was committed
 - ~ matters affecting rights and duties are substantive in nature
 - ~ lex loci delicti: the law of where the wrong took place
- Judgement: after hearing, the decision handed by the judge is called the judgement
 - in smaller courts, the judgement may be given ex tempore (orally)

- this is also seen in urgent interlocutory hearings where Anton Piller (search) orders are sought
- in complex cases it may take longer to hand down lengthy written judgements
- Appeal:
 - only small percentage of cases are appealed
 - it is about balancing need of parties for finality against the need of the court system to run as it should; with important cases being heard by the best judges and minimizing injustice
 - = The Bell Group v Westpac [2008] has had ongoing appeals
- Civil procedure's state of flux: address by CJ of HC Murray Gleeson
 - more cases relying on written evidence and argument
 - this does not make the process any faster
 - process is still lengthier than before
 - = case management is important but not so much that it amounts to interference
 - a capacity to control counsel and witnesses without sacrificing fairness is important skill of judges
 - challenge to balance competing needs of society for speedy, cheap and efficient litigation with justice being made accessible to all vs the law developing carefully to allow parties time to prep their cases
 - = balance isn't easy
 - = these laws change often as with society
- Court hierarchy and legislative framework for civil procedure:
 - Australia is not a single uniform jurisdiction, where we have different rules for States and between the hierarchy of courts whose rules are not uniform
 - = McKain v RW Miller (SA) (1992): States and their distinct laws can cause disparities between the outcome of a case with the same facts between States.
 - each State has its own jurisdiction and would not apply the rules or law of another State in their courts; which is then again different to the rules governing the Federal courts
 - these rules change regularly and are reform to meet the changing needs of society
 - Australian courts have essentially evolved from the English Court system
 - = there has been a constant effort to get all States to adopt the uniform law
 - = NT and VIC are almost uniform
 - = remember that the final court of appeal for all courts in Australia is the HCA
 - below refer to details for the Supreme Courts in each Australian jurisdiction as well as the relevant federal civil procedure legislation
- NSW Court hierarchy:

- NSW local court: matter up to 100,000\$
- NSW District court: matters between 100 and 750K
- NSW Supreme Court: 750K +
- Civil procedure legislation:
 - = Civil procedure act 2005 (NSW) (CPA)
 - = Uniform Civil Procedure Rules 2005 (NSW) (UCPR)
- States with civil procedure rules within their court hierarchy: NSW, VIC, ACT, QLD
- = States with non-uniform procedure rules throughout the State: Tas, WA, SA and NT
- Commonwealth civil procedure:
 - Federal Court Civil Procedure legislation:
 - = Civil Dispute Resolution Act 2011 (Cth)
 - = Federal Court of Australia Act 1976 (Cth)
 - = Federal Court Rules 2011 (Cth)
 - Federal Court hierarchy:
 - = Federal Magistrates Court: mostly parallel jurisdiction with the FCA
 - = Family Court of Aust
 - = Federal Court of Aust
- HCA
 - Civil procedure legislation:
 - = High Court of Aust Act 1979 (Cth)
 - = HCA Rules 2004 (Cth)
 - = HCA is final court of appeal after the FCA and Supreme Court from each State
 - = remember the SC and FCA have their own internal appeal courts, so matters that have been appealed from there then go to the HCA
- Civil procedure in the federal jurisdiction:
 - when matters involve Commonwealth law, the disputes will attract federal jurisdiction and be governed by the most common HCA, FCA and the 'family Court
 - = matters about family law, trade practice, corporations law, migration law, constitutional matters and marriage would attract federal jurisdiction
- High Court:
 - final court of appeal for all Aust states and territories including the SC and FCA
 - high court usually hears matter about substantive issues which are generally not substantive in nature

- the HCA also has original jurisdiction (being able to hear cases for the first time) for matters pertaining to the Australian Constitution
- HCA proceedings governed by High Court Act 1979 (Cth) and HCA Rules 2004 (Cth)
- = the HCA Rules are divided into 5 chapters: general; rules, rules proceeding in original jurisdiction of court, election petitions, proceedings in appellate jurisdiction of court, costs
- ~ 2.01. Application of these Rules
- ~ 2.02. Dispensing with compliance
- ~ 2.03. Failure to comply
- The Federal Court
 - governed by the FCA Act 1976 (Cth) and the Federal Court Rules 2011 (Cth)
 - = court fees are regulated by the FCA Regulations 2004 (Cth)
 - = as with the HC rules, the FC also has discretion in relation to its rules under ch 1, part 1, div 1.3 under the general powers of the court
 - ~ 1.31. Orders to have regard to nature and complexity of proceeding
 - ~ 1.32. Court may make any order it considers appropriate in the interests of justice
 - ~ 1.33. Orders may be subject to conditions
 - ~ 1.34. Dispensing with compliance with Rules
 - ~ 1.40. Exercise of Court's power
 - ~ 1.42. Orders may include consequences of non-compliance
 - = other federal courts and tribunals
 - ~ Family Court
 - ~ FMC
 - ~ AAT
 - ~ ACCC
 - ~ HREOC
 - ~ AIRC
 - ~ Copyright Tribunal
 - ~ Migration Review Tribunal
 - ~ Refugee Review Tribunal
 - ~ Social Security Appeals Tribunal
 - ~ National Native Title Tribunal
- New South Wales
 - governed by CPA 2005 (NSW) and the UCPR 2005 (NSW)

= 3 tier court hierarchy of local court, district court and Supreme Court which are all governed by the 2 Acts above

= specialized courts and tribunals:

~ Land and environment court

~ industrial court of NSW

~ dust diseases tribunal

~ workers comp tribunal

~ mental health review tribunal

~ victims compensation tribunal

~ administrative decisions tribunal

- CPA provides broad discretionary powers to judges as well as containing overriding provisions for the just, quick and cheap disposal of litigation

= broad court discretionary powers can be found in the CPA sections below:

~ 14. Court may dispense with rules in particular cases

~ 15. Practice notes

~ 16. Court may give directions in circumstances not covered by rules

Chapter 2: Case Management and other pre-commencement considerations

- Overview
 - litigation should be a last resort
 - = parties should consider whether ADR would be better for their dispute (mediation, conciliation, arbitration)
 - = it is an unpleasant experience
 - case management has helped improve court efficiency but is still a stressful, costly and time-consuming process
 - lawyers must ensure that proceedings are commenced within the right time otherwise according to statutory limitations their claim may be barred
 - = lawyers must ensure all preliminary matters have been undertaken and that other pre-litigation steps are done without delay
- Case management:
 - found in statutory reforms in the CPA 2005 NSW, UCPR 2005 NSW, CPA 2010 Vic and FC Rules 2011 (Cth)
 - = case management: the role of courts in administering and intervening in the preparation of a case for trial

- = parties no longer negotiate case timetables without judicial input
- = case management aims to reduce cost and delay associated with civil litigation
- Australian courts now give directions as to the timing and nature of steps parties undertake to prep for a case, including:
 - = extent of document discovery
 - = volume of oral and written evidence
 - = submissions
 - = issues in dispute
- courts guided by overarching principles of justice and fairness
- What is case management: how courts manage their workload of cases and what a court does in the context of a particular case to manage that case
- The HC resurrection of case management: *Aon Risk Services v ANU* 2009 HCA 27
 - case requested late amendment of pleadings and whether this should be allowed
 - unfair prejudice in delaying proceedings
 - court is a publicly funded resource and has limited availability
 - need to maintain public confidence in the court system
 - = unnecessary delay is unfair prejudice
 - court found that ANU's application to amend should not have been allowed
 - look beyond the interests of the parties in the case in front of the court to the needs of other cases in society
- Legislative strengthening of court's case management obligations
 - Current legislative changes to make overriding purpose the just, quick and cheap resolution of disputes
 - = these insertions create more uniformity between differing State boundaries
 - = these terms are abstract and not readily defined
 - = the right to have a full and proper hearing must be balanced with the court's need to be efficient
 - = this gives more discretionary powers to courts
 - = justice usually means: natural justice, procedural fairness, the right to be heard and *audi alteram partem* (hear the other side)
 - the NSW equivalent of the 'overarching provisions in Vic are in part 6 of the CPA 2005 NSW
 - = div 1: guiding principles ss 56-60: applies to cases from start to finish
 - ~ most important section in relation to case management
 - ~ gives court a very broad power of discretion

- ~ s 57 clarifies the need for speed and efficiency but does not direct whether the court should apply greater weight to the interests of the court or to the parties and litigants
- ~ s 58 “to act in accordance with the dictates of justice”
- ~ s 59 about reducing the time of proceedings
- ~ s 60: costs of proceedings court be proportional to the complexity of the case so as to not have a mega litigation for two neighbors arguing to fix a fence
- = div 2: powers of court to give directions ss 61-63
- = div 3: other powers of court ss 64-73
- = div 4: persons under legal capacity ss 74-80 (has limited application)
- = div 5: interim payments ss 81-84 (has limited application)
- = div 6: miscellaneous ss 85-89
- ~ s 14 allows the court to dispense with the requirements of the rules if appropriate
- ~ create rules where none apply s 16
- ~ a ruling can then be justified to be disposed of in a just , quick and cheap manner as opposed to going through standard procedure giving courts extensive discretion!
- thus the objects of case management can be summarized as being:
 - = just s 57(1a)
 - = quick for the court s 57(1b)
 - = cheap for the court s 57 (1c)
 - = quick and cheap for parties and efficient for other proceedings s 57(1d)
- How to utilize legislated case management provisions: Hans Pet Constructions v Cassar 2009 NSWCA 230
 - **Facts:** the plaintiff sued the defendant and took a long time to provide particulars for its pleading. As a result, the defendant was unable to meet the timetable and required further time for pleadings. The trial judge, relying on s 56 of the CPA, struck out the defence and ordered the proceedings to proceed to a damages hearing due to non-compliance with directions.
 - **Held:** The power to strike out a defence was subject to s 58 which in turn mandated consideration of s 56 and 57, including s 57 (1) (a) - “the just determination of the proceedings”. The trial judge failed to give due weight to the requirement of the just determination of proceedings, and thus miscarried his discretion in striking out the defence.
- The growth of broad case management discretions across Australia
 - NSW and Vic not the only jurisdictions to have provisions granting broad case management discretion or imposing overriding obligations of justice and efficiency