

Week 1 – Key themes in CP

- Civil procedure focuses on concepts and principles of civil litigation which are developing towards national uniformity.
- Civil litigation is b/w private parties (individuals, corporations, governments)
- Litigation includes pre-commencement considerations, pleadings, gathering and preparing evidence, exploring non-litigious resolution, trial, judgment and appeal.
- Law governing litigation can be:
 - Substantive, relating to substance of the claim (law of contract, equity, tort, family)
 - Procedural, governing how and where the claim is to be heard (court rules, evidence, civil procedure legislation)
- *Taylor v Queensland Law Society Inc* (2011), Daubney J:
 - 'matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that appear to be concerned with issues of substance'
 - 'rules which are directed to governing or regulating the mode or conduct of court proceedings are procedural; and all other provisions or rules are substantive'
 - 'the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure'
- Inherent challenge is to balance competing needs for cheap and effective litigation vs law to be developed with consideration of parties needs and rights.
- Australia is not a single uniform jurisdiction. *McKain v RW Miller* (1992) 'nature of the federation created by the Constitution that the States be distinct law areas whose laws may govern any subject matter subject to constitutional restrictions and qualifications. These laws are capable of creating disparities in the legal consequences to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws.'
- Applicable law depends where you are litigating and what you are litigating. There is still a high level of common ground b/w all jurisdictions in Australia (eg derived from English court system, HCA is ultimate court of appeal).
- Any dispute arising in relation to a Commonwealth law (Marriage Act 1961, Competition and Consumer Act 2010, Corporations Act 2001) attracts federal jurisdiction.
- HCA may have 'original jurisdiction' or on appeal from lower courts in hierarchy. Proceedings governed by High Court Act 1979 (Cth) and High Court of Australia Rules 2004 (Cth)
- FCA also has wide discretion in relation to governing rules (Chapter 1, part 1, division 1.3).
- In NSW, civil procedure governed by Civil Procedure Act 2005 (NSW) and Uniform Civil Procedure Rules 2005 (NSW). All courts in NSW governed by CPA and UCPR. Rules may be dispensed in accordance with ss 14-16 CPA.
- Section 56 of CPA:

56 Overriding purpose

(cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(3A) (Repealed)

(4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3):

(a) any solicitor or barrister representing the party in the proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a relevant interest in civil proceedings if the person:

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note. Examples of persons who may have a relevant interest are insurers and persons who fund litigation.

(7) (Repealed)

- Read material on *Aon Risk Services Australia Limited v Australian National University*.