CIVIL PROCEDURE

TABLE OF CONTENTS

CRIMINAL PROCEDURE

TABLE OF CONTENTS

I. Process, open justice and the adversarial system

i. Open justice & fairness

What is procedural law?

- ➔ rules which are directed to governing or regulating the mode or conduct of court proceedings
- ➔ it is the way in which a right is enforced, not the way in which the right is established
- ➔ different to substantive law – which defines the right, duty, power, liability
- ➔ if you commit offence in VIC but case is heard in NSW – the procedural law that applies is NSW and the substantive law that applies is NSW

- Purpose of procedural law?
  - provide *procedural fairness*
  - create accurate decisions
  - enforcing the substantive law
  - address costs and delays
  - but have to find balance bw cost and accuracy

What are the sources of civil procedural law?

1. Powers provided by statutes – (1) Uniform Civil Procedure Rules (UCPR); (2) Civil Procedure Act (CPA)
2. Inherent jurisdiction – Superior courts have inherent power to prevent abuse of process (Supreme Court)
3. Implied jurisdiction – Lower courts have implied power to do that which is required for the effective exercise of its juris (Pelechowski v Registrar)

Principles of open justice and fairness

- ➔ open justice = the conduct of proceedings in public (John Fairfax Publications – Most fundamental aspects of justice system Spigelman CJ)
- ➔ this allows for accountability
- ➔ it means that courts must use people's real names, the public has access to court docs, witnesses should physically give evidence in the court, that there are reasons provided for judges decisions (Wainohu v NSW)
- ➔ the publicity of proceedings is a reassurance that justice is being administered fairly and impartially (Hogan v Hinch)

How can justice be closed? What powers enable the court to do so? What will they consider?

But, justice can be closed (inherent & implied juris; statute)

- closed court orders can exclude the public (s 71 CPA)
- non-publication orders – of proceedings or evidence (Court Suppression and Non-Pub Orders Act 2010)
- suppression/pseudonym orders (Court Suppression and Non-Pub Orders Act 2010)
- can give evidence by CCTV
- secret evidence (warning: rare) – whereby judge can see evidence but not shown to a party E.g. ASIO security checks
- ➔ Test to use: John Fairfax and Sons 1986: if it is really necessary to (close justice) in order to secure the proper administration of justice.
- ➔ Necessary? "A court can only depart from [open justice] where its observance would frustrate the admin of justice or some other public interest for whose protection Parliament has modified the open justice rule".
- ➔ Hogan v Hinch (names of paedophiles suppressed – Derryn Hinch case): necessary does not mean convenient, reas. (reas. = reasonable) or sensible or to serve some notion of the public interest'

Categories of cases exempt from open justice

- to protect identity of an informer (Witness v Marsden)
- to protect the identity of victims of blackmail (R v Socialist Worker Printers 1975)
- to protect matters of ntnl security (Mirror Newspapers 1985)
- to protect wards of the state/mentally ill (Scott v Scott)

Rinehart v Welker

Children alleged Gina breached trustee role – Gina had agreed w them that a trustee dispute must be dealt w thru ADR + previously applied 4 a suppression order 4 e/t I the action (under their ADR agreement any dispute would be kept confid)

First instance: CSNPA granted

Second instance: CSNPA still granted

Third instance: Held that the order should not have been made bc of the public interest in open justice – public should scrutinise trustee's actions – did not give effect the confid clause in deed → J did give a pseudonym order though.

Fair trial = the ultimate aim of all trials

- ➔ involves reas. notice of case, reas. opportunity to present case, right of cross-examination = procedural fairness
- ➔ principle is based on the inherent power of the court to control its own processes and to prevent an abuse of its process

Stead v State Govt Insurance

Negligence action – had to b proved the accident wasn't Ptf's (Ptf = Plaintiff) fault – Dft (Dft = Defendant) used evidence from a Dr but J stopped Ptf from arguing its validity + J referred to the Dr's testimony in final address. Rude.

Yes, was unfair of J to not listen to arguments about Dr's evidence.

The Crown as model litigant → they must act w complete propriety, fairly & in accordance w professional standards.

ii. Adversarial system

Features of an adversarial and inquisitorial litigation system

Adversarial system (common law)	**Inquisitorial system** (civil law)
Party-controlled	Judge-controlled
Relies on precedent + procedure + laws of evidence	Mainly codified > judge-made law
Distinct pre-trial and trial process. Trial as end of proceedings.	Pre-trial & trial = same process
Emphasis on oral argument & evidence	Not many courtroom rules
Losing party bears costs	Virtually no cross-examination
Impartial judge	Emphasis on documentary proof
	E.g. Royal Commissions, ICAC, Coroner's Court

Shortcomings of an adversarial system?

- Inequality between parties E.g. DPP v single barrister → DPP can handle a long drawn out party better
- So, this impacts access t justice
- Creates delay
- High costs – for private litigants & taxpayers

Criticisms of judge acting as umpire? See Lord Woolf's inquiry.

iii. Case management

UK: Lord Woolf's inquiry? Main reforms? Impact in A?

➔ Found that the unrestrained civil adversarial culture where litigants control the process = a problem!
➔ Recommended:

- transfer control from parties to the Court E.g. Registrars
- increased use of ADR
- early settlement
- move to trial more quickly
- appoint a single expert witness instead of using heaps
- early identification and reduction of issues

ALRC Report 2000 *Managing Justice*

- need a simpler, cheaper & more accessible legal system
- judges need to take a more active role in managing cases

UK: Jackson report 2010

- costs actually increased after Woolf reforms, bc it increased the judge's role
- the court was tolerating delays in litigation
- so need to create new standards for non-compliance

Managerial judging

➔ focuses on role of judge in the case
➔ J (J = judge) takes control of the case & timetables the steps 2 b taken
➔ BUT preoccupation w the disposal of cases should not reduce justice

Case management

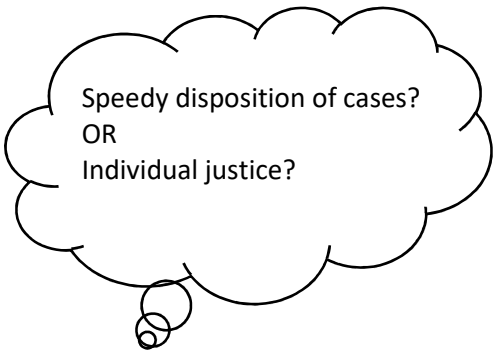
➔ arose out of problems w delay & excessive costs
➔ court imposed timetable on parties
➔ w disciplinary elements for breaches of the timetable, including costs orders
➔ increased juris of lower courts to reduce pressure on SC
➔ more judges
➔ used method of 'blitz' – listing similar cases together
➔ ss 56-59 CPA
➔ s 56: OVERRIDING PURPOSE OF THE CPA IS TO FACILITATE THE JUST, QUICK AND CHEAP RESOLUTION OF THE REAL ISSUES IN THE PROCEEDINGS (with s 57(1))
➔ s 56(3): parties have duty 2 help court achieve this purpose
➔ s 57(1): objectives of case management
➔ s 58: court must follow these factors
➔ s 59: court must try to eliminate delay
➔ s 60: test of proportionality – the cost of dispute resolution must be proportionate to what is in dispute

Queensland v JL Holdings

JL sue QLD – 2 yrs of directions hearings – 6 mths into 4 mth trial & chill – QLD sought leave 2 amend its defence & add an additional ground

First instance: Judge refused this bc of case management - if it was granted the trial would be delayed by a further 6 mths

Second instance: HC appeal.



In this instance, individual justice won out, because of the extra defence that was being added. Case management was trumped by the attainment of justice, as justice is the ultimate aim of the courts. QLD allowed to amend defence.

Aon v ANU

3 days into four week trial & chill – ANU sought an adjournment to amend statement of claim to add a substantial new claim.

Case management v individual justice

First instance: Trial judge awarded the adjournment (Based on QLD v JL)

Second instance: Aon appeal to HC (HC = High Court). HC held that you must consider: justice for parties AND court resources AND other litigants AND public confidence in the legal system. Bc ANU introduced the claim too late (during the trial), it was too late.

Why was it granted in QLD and not Aon?

- ANU application was during the trial
- It was inadequately explained
- Was a deliberate tactic
- It required vacation of the planned trial date
- It raised an entirely new claim against Aon

s 56 CPA?

A just resolution requires minimising cost and delay. Aon.

But, procedural fairness will entail cost and delay! Passing of time may be a side-effect of gathering evidence & making arguments but delay can also mean that memory fades

It may be necessary to provoke a feeling of injustice in one party to create justice for another.

Expense Reduction Analysts Group v Armstrong 2013

Interlocutory dispute – privileged documents were accidentally given to the Ptf by the Dft – Ptf refused to return them & claimed that privilege had been waived.

Re. CPA:

- ➔ Court must first consider the overriding purpose and then the s 58(2) factors
- ➔ CPA imposes duty upon solicitors to facilitate the CPA's purposes
- ➔ Ptf should have just returned the docs to avoid this time-consuming mess

II. Appropriate/alternative dispute resolution

Identify and explain various types of ADR

- Facilitative
  - practitioner assists parties to reach consensus
  - E.g. mediation, facilitation & facilitated neg (neg = negotiation)
- Advisory
  - practitioner advises parties of solutions
  - E.g. expert appraisal, mini-trials, early neutral examination
- Determinative
  - practitioner makes a determination
  - E.g. arbitration, expert determination, private judging
- Hybrid
  - combo of all 3
  - E.g. conciliation, conferencing
  - or 'Med-Arb' – mediation and arbitration

Types

- Negotiation
  - involves no 3rd party
  - can be conducted by lawyers
  - cost effective
  - clients retain control
  - success depends on research & negotiator's skill
  - fails if parties will not compromise
- Mediation
  - most widely used
  - neutral 3rd party facilitates agreement bw parties
  - consensual or court mandated
  - not **binding**
  - involves identification of disputed issues, development of options & consideration of alternatives
  - inc (inc = including) expert advisory, settlement mediation, facilitative mediation, wise counsel mediation
  - mediators support exploration of issues & evaluate options + offers
  - role of the lawyer = advise mediation, explain it, negotiate, attend & draft settlement negs
- Compulsory mediation
  - for all or part of the claims/claimants
  - mediation ordered by the court – permitted by CPA s 26 – even if parties don't consent
  - CPA s 27 – parties must participate in good faith
  - Higgins v Higgins: Dfts opposed mediation – but mediation still ordered bc it would only take 1 day and would minimise costs. The Ptf was an elderly woman w deteriorating health, so they don't want a long drawn out court process. But sometimes if parties don't want mediation then they won't co-op and doing it would be useless
  - Waterhouse v Perkins: Ptf refused mediation – Dft sought order 4 compulsory mediation – mediation ordered bc litigation was lasting 10 yrs & would be cheaper as mediation
  - Oasis Fund Management 2009: s 26 mediation ordered – Dft opposes mediation at this time. Principal issue is whether there is enough info to mediate successfully
  - Tony Hassan Noun 2014: Dft wants mediation, opposed by Ptf. Parties had prev agreed to mediate after all evidence had been served. Mediation ordered as soon as parties receive evidence.

- Compulsory arbitration

- arbitration is formal, quadi-judicial – 3rd party renders a **binding** determination
- can be consensual (arbitration clause in a C) or court ordered
- s 38 CPA – court ordered
- s 42 CPA – can apply to court for a rehearing if unhappy w the decision
- arbitration is quicker than court, more expertise than mediation, is enforceable, and cheaper than court
- John Holland v Kellogg Brown: Had arbitration clause as part of dispute resolution clause. Courts must not use litigation where parties have a valid arbitration agreement (s 8 Commercial Arbitration Act)
- Larkden v Lloyd Energy: Arbitrator could resolve dispute but not grant a patent
- Westport Insurance: A complex arbitration – an alleged failure of arbitrator to provide reasons for decision.
- Colin Joss & Cube Furniture: Ptf wants decision set aside bc it is against natural justice – but has to demonstrate real unfairness not procedural imperfections

➢ Referral to referee

Division 3 References to referees

20.13 Definitions (cf SCR Part 72, rule 1)

In this Division:

order of referral means an order in force under rule 20.14.

question includes any question or issue arising in any proceedings, whether of fact or law, or both, and whether raised by pleadings, agreement of parties or otherwise.

20.14 Orders of referral (cf SCR Part 72, rule 2)

(1) At any stage of the proceedings, the court may make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or on any question arising in the proceedings.

(2) The court must not make an order under subrule (1) in respect of a question to be tried with a jury.

20.15 Appointment of referees (cf SCR Part 72, rule 3)

(1) Subject to this rule, the court may appoint any person as a referee.

(2) A judicial officer or other officer of the court may not act as a referee otherwise than with the concurrence of the senior judicial officer.

- Court can order referral to referee. can be 2 or more referees r 20.16
- under r 2.24 a court may:
- r 1b: require an explanation by way of further report
- r 1c: remit for further consid any matter
- r 1d: may decide any matter on the evidence adduced by the referee
- Cave v Allen Jack 2014: The rule confers general discretion to refer matters to a referee whenever it will achieve the just, quick & cheap resolution of justice. They referred it to a referee in this case because referee could hear case quickly, v flexible, informal, will make it shorter & cheaper
- Choc Factory Apartments 2005: UCPR 20.24 1(a) court can adopt, vary or reject the report of a referee in whole or in part.
- Bellevarde Construction 2008: Parties must express the issues they want the referee to report on & referees must deal w all matters b4 them

➢ Expert determination

- participants present arguments & evidence to a dispute resolution practitioner who is chosen on the basis of specialist qualification
- decision is binding! **expert appraisal** decisions are not binding tho
- parties can choose the Ts and Cs of the process = so it is flexible, informal and reduces cost and delay
- but is bad when there are contested factual issues + there is problematic enforcement – if u don't comply u have 2 go to court 2 enforce it
- Shoalhaven v Firedam: Ptf says it did not give consistent reasons & so did not comply w requirements of clause in the C → no inconsistency found
- John Nelson v Focus: Basis on which an expert determination may b impugned – if terms of C are fraudulent etc → the Critical Q = is if the decision was made in accordance w the terms of the C

Reasons for growth of ADR

- professional obligations – Professional Conduct & Practice Rules 2013 r 7.2
- increasing costs of litigation
- court is more willing to use its power to direct compulsory ADR
- delay in court processes
- s 56 CPA!

Benefits of ADR

- can allow access to justice (it's cheaper than litigation)
- can be faster (don't have to wait for court)
- permits more participation (parties can tell their side & have more control)
- can be flexible and creative (can choose the ADR process for them & how to resolve dispute)
- can be cooperative (work together w mediator)
- can reduce stress
- can remain confi (s 30(4) CPA) – is not conducted openly in court; no records kept
- benefits of settlement generally
  - they are consensual (although based on compromise)
  - higher range of possible solutions
  - allows for more than simple Ptf/Dft cases
  - higher access to justice as there are more forms of it available

Crit of ADR

- unsuitable for some disputes E.g. anything in the public interest, can't create legal precedent, or if the r/ship bw parties has broken down as it requires co-op
- lack of court protection – binding ADRs usually remove the entitlement to judicial determination
- lack of enforceability – E.g. issues over the drafting of a deed
- there may not be access to discovery/subpoenas/notices to produce
- if the matter does not settle at ADR & it still goes to court, it makes the dispute last longer
- fairness? few procedural safeguards
- can be used a way of putting off the hearing
- inequality esp if there are unrepresented litigants

Necessary comm skills for ADR?

- interviewing skills – must interview client to get opinion of which ADR
- advocacy – of client's interests
- giving advice re. the law
- interpersonal skills E.g. rapport

Judges & settlement

- judges can order:
  - compulsory mediation s26 CPA
  - compulsory arbitration s38 CPA
  - compulsory referral to referee r 20.14 UCPR

Mediation discussions used as evidence in proceedings

➔ as per s 30(4) CPA: evidence of anything said is not admissible in any proceedings inc any docs prepared for the purpose of mediation

III. Matters preceding litigation & commencing litigation

1. Filing summons (substantive) = how to have a Court decide a prelim question b4 u have commenced litigation E.g. preservation order
2. Filing a Notice of Motion (NoM) (procedural) = how to have a court decide a q after litigation commenced

i. Court

Court	*Money amount*	*Matters*
Supreme Court	> $750 000	- unlimited civil juris - deals w most serious crim matters - equity division = commercial law, corp law, equity, trusts, probate, family provision - Court of Appeal & Court of Criminal Appeal
District Court	Matters up to $750 000	Intermediate court
Local Court	- 60 000 limit for personal injury - Small claims division - <$10 000 - General division - $10 000 - $100 000	
Industrial Relations Commission & Industrial Court		Equiv to SC E'ment law & IR
Land & Environment Court		Env, planning, development & building disputes
Worker's Comp Commission		
NSW Civil & Admin Tribunal		Inc. 22 tribunals E.g. Guardianship, Victim's Comp
Independent Commission Against Corruption		ICAC can do anything the DPP says
Dust Diseases Tribunal		Asbestos
Mental Health Review Tribunal		

Cross-Vesting – Juris of Courts (Cross-vesting) Act 1987

After Wakim – conferral of fed juris on2 state courts s 4; cross-vesting of state courts amongst each other s 4; transfer of proceedings bw courts s 5

BHP Billiton v Schultz 2004

- Asbestos victim – BHP wanted case transferred from the Dust Diseases Tribunal to SC.
- Criterion for transfer = must b in the **interests of justice** to move case to SC
- s 5 → does not involve the consideration of the interests of the Ptf > Dft.
- The Tribunal has procedural & evidentiary advantages bc of its special status

Imp factors:
- where parties reside/live
- location of issues of dispute
- sig of local knowledge
- law governing the issue
- procedures available
- likely hearing dates E.g. might be less of a delay in Dust Diseases > SC
- if it should be sent to a specialist court

ii. Prelim discovery