

Week 1: Process, Open Justice and Fairness; Adversarial System of Justice, Case Management

1. What is procedural law? Differs from substantive law (e.g. CLA)

- “Rules which govern/regulate mode/conduct of court proceedings” - *McKain v R W Miller* (1991) 174 CLR 1 at 26-27 per Mason CJ
- *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**)

Purpose of procedural law

- Procedural fairness
- Accurate decision making
- Can be modified to address issues (cost, complexity, delay)
- Procedure is critical to perceptions of fairness
- - (Issue: balance btwn cost & accuracy. Resources are limited)
Adrian Zuckerman “no perfect rectitude of decision” → current mindset: Civil procedure NSW has to be applied with keeping in mind as *quick & cheap* as possible

Function of civil court:

- Enforce rights
- To arrive at truth to enforce remedy (dispute resolution)

Aims of rules of procedure: to provide due process

Main sources of civil procedural law-state

- *Civil Procedure Act 2005* (NSW)
- *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**)
- Each court also can have own acts?
- Super courts have **inherent** jurisdiction → to regulate process & prevent abuse of process
Statutory (district & local courts) have **implied** jurisdiction → for effective exercise of its jurisdiction

General themes

- Truth, time, resources: *quick & cheap*
- Procedural fairness
- FINALITY

2. Open justice? Applies to both civil & criminal: IN PUBLIC: anyone can watch

- Most fundamental aspect of Aus justice
- Judgements accessible on AustLii
- Media reports
- Evidence & filed documents can be accessed & published
- Parties use real name
- Witnesses use real name & come in physically to give evidence
- Open reasons for judge decision

- **Publication: absent any restriction, anyone may publish a fair report of proceedings** (*R v Richards & Bjkerk* (1999) 107 A Crim R
→ Publicity of proceedings protects against arbitrary power & **reassures impartial justice administration**

But, justice can be closed for reasons:

- Powers to close justice come from common law (inherent/implied jurisdiction) & statute
- Child cases/sensitive cases

Type	Law/power to make orders	Example
Closed court order: exclude public from court (common)	Common law. CPA s71. Inherent jurisdiction (of supreme courts to regulate their own procedure) -Is it necessary to close the court to secure the proper administration of justice? (<i>John Fairfax & Sons</i>) -Observed in <i>Jogan v Australian Crime Commission</i> : necessary is strong: does not mean 'convenient'	
Non-publication order (common) *TAKE NOTE DIFFERENCE BETWEEN THESE TWO	<i>Court Suppression & Non-publication Orders Act 2010 (NSW)</i>	
Suppression orders: restrict access to confidential information	<i>Court Suppression & Non-publication Orders Act 2010 (NSW)</i> (not the only act but this course focuses on NSW) -to "safeguard the public interest in open justice" -s7 power to make orders (witness identity, evidence) -s8 grounds for making an order: (prevent prejudice, protect person, national security etc)	e.g Seven Network (Operations) Ltd & Ors v James Warbuton; Gina Rinehart Litigation <i>Welker & Ors v Rinehart</i> [2011]
Pseudonym orders (real ID not used)	<i>Court Suppression & Non-publication Orders Act 2010 (NSW)</i>	e.g <i>Witness v Marsden & Anor</i> (2000) 49 NSWLR 429 in KLV at pg 25; <i>A v Bird</i> ; <i>C v Bird</i> at 47
Witness give evidence from another location by CCTV	Separate legislation e.g <i>Children (Criminal Proceedings) Act 1987 (NSW)</i>	(e.g undercover officers, child sexual abuse)
Secret evidence (RARE)	(separate legislation)	e.g immigration case visa check kept secret from applicant

- Suppression order
→ E.G Gina Rinehart Litigation *Welker & Ors v Rinehart* [2011]
-application made by her children for breach of trust
-Gina applied for suppression order. She said wanted ADR. Didn't want matter to go court.
Basis was ADR agreement for proceeding confidentiality.

- (No 2) NSWSC 1238 said no its not ADR?
- Court of appeal: (Tobias AJA) she applied for another suppression & non-publication order. 1 judge agreed. Ptf's & media objected to order
- Hearing in Court of appeal: appealed the decision to grant suppression order (media appealed). Held that: order **shouldn't** have been made: public interest in open justice overrides: trustee behaviour should be scrutinised

Test in common law: for reasonableness of closed court

- Is it necessary to close the court to secure the proper administration of justice?
(*John Fairfax & Sons*)
- Observed in *Jogan v Australian Crime Commission*: necessary is strong: does not mean 'convenient'
- **Exceptions to open justice**: where a court will depart from open justice are "few & strictly defined")

-wards of state, mentally ill people -blackmail & extortion - informers -national security
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3. Fair trial?

- R.e fairness. Court has its' own power to prevent any abuse of tis process: it has power to control its proceedings to make sure they're fair
- E.g reasonable notice, to prepare & present case, to cross-examination

4. Adversarial system of litigation?

- Common law - adversarial
- Civil law – **inquisitorial**

Common law- Adversarial: (ctrld b parties)	Civil law- Inquisitorial (controlled by judge)
-party controlled dispute (parties define dispute, present evidence & argument) -use of precedent -trial is climactic end of litigation process -judge as impartial umpire -emphases on oral argument/evidence esp cross-examination -parties bear cost (loser bears winner cost)	-Law found in codes -no rigid separation btwn pretrial & trial -minimal rules of court room practice -judge is proactive & inquisitive -virtually no cross-examination: reliance on documents
Issues: -inequality btwn parties -Lord Woolf's Report <i>Access to Justice</i> 1996: wanted to see control transferred from parties to court, control of public services with service provider, more ADR, movement to trial as quick as can -ALRC Report no 89 <i>Managing Justice</i> (2000): judicial officers (judges) should take an active role in managing proceedings from an early stage -Jackson Report in 2010: looked at what happened after Lord Woolf's	-e. g royal commission into child sexual abuse, IPAC Issues: delay, cost (public & private=unjust, inequitable, inaccessible), so where is access to justice?

reform: costs went up. Court tolerated delays. Recommended new standard for non-compliance	
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5. Case management?

- Court imposes timetable on parties (once proceedings commenced)
- If timetable not kept, discipline e.g cost order
- CPA s56-59
- **CPA s56** (1) **overriding purpose: just, quick & cheap resolution** of issues of proceedings.
(3) **parties have duty** to facilitate this purpose
- S57: proceedings to have following objects: just determination, efficient use of resources, timely disposal of proceedings, at cost affordable)
- S59 elimination of delay
- *Queensland v J L Holdings* (1997) 189 CLR 146
 - Timetabled hearings for 2 years
 - 6mth before 4mth trial, Qland sought leave to amend defence to add additional grounds
 - (judge can allow but allow cost order to cure prejudice for other side)
 - but in this case, NO: focused on delay
 - Qland appealed to High Court
 - issue: **Speedy disposition of cases v individual justice**
 - *Dawson, Gaudron & McHugh JJ*: case management not over justice and allowed leave.
- *Aon Risk Services Aust Ltd v ANU* (2009) 239 CLR 175
 - At beginning of month trial, ANU ptf applied for adjournment (waste of the judge as a public resource: can't just put something in there for him) & leave to amend its statement of claim. Trial judge applied *J L Holdings* and allowed this.
 - Aon appealed to HCA.
 - HCA held that focus is not just on **justice** but also **court resources**, other **litigants** and **public confidence** in the system. Judged in this case bc they did it into the trial as well.
- **J L Holdings distinguished?**
 - before vs during the trial
 - inadequately explained in Aon
 - Aon seemed to reflect deliberate tactics
 - Required judge to vacate 4 week trial dates whereas JLH 6 months before trial
 - Qld raised entirely new claim against D
- Critiques: *After the Civil Procedure Act*, Chief Justice Bathurst in Ten Years of CPA
 - balance btwn justice, efficiency, economy
 - over management can make it quick but expensive (e.g prep of witness statements takes long time)
- **Expense Reduction.** In what way was s 56 used by the High Court to deal with the appeal?
- [2013] HCA 46: Judgement para 51 + notes:
- CPA s56(1): the **overriding** purpose of the CPA (and UCPR rules) is "to facilitate the **just, quick and cheap** resolution of the real issues in the dispute or proceedings."

- Judgement para 57: The High Court used the overriding purpose of s56 the CPA to be the facilitation of just, quick and cheap resolutions of issues to determine that the Supreme Court's decision was wrong, and it allowed the appeal. This was done to further the overriding purpose, but within the dictates of justice such as being not at all costs. In this instance, the minor issue of the 13 documents were heard over substantial hearings. The High Court found that this was unnecessary/wrong/ (right word?) as it did not further the CPA's overriding purpose of a just and quick resolution of the issue. The hearings on the documents instead wasted court resources, wasted time and money and distracted from a real solution to the issue. The High Court found that the Supreme Court should have permitted (Norton Rose) to amend the documents themselves according to a relevant power the court has to further the overriding purpose, the powers being CPA S64.
- Expense Reduction. S56 HCA. One side accidentally gave the other side privileged documents. Asked for them back. Other side said no you've waived client legal privilege. Other side sought an order to get them returned.
- Used s56 to dispose of the appeal. The just resolution was for the documents to be returned.

Tute

- Big issue: Cost and delay

ADR: Resolving disputes w/o litigation: **ADR** ('appropriate')

- It's better if you're gonna settle to settle quickly: rather than waste case management cost etc. Doesn't have to have trial
- Definition: usually describes DR where independent person (e.g mediator/ADR practitioner) helps people to resolve dispute.
- Can occur in court proceedings or without it. Even though it's often used to avoid court

4 main types of ADR

1. **Facilitative:**

- conciliation, facilitation, facilitated negotiation

-mediation (*most common).

- a. Mediators are barristers, ex-judicial officers.
S26 CPA: compulsory referral by court where judge doesn't need consent of parties (bc it normally works even if they unwilling); if it fails continue with case.
Sometimes ordered for Family Provision Act bc why waste will money doing it),
- b. In Supreme Court there are 2 types:
 1. Court annexed (free by Court Deputy Registrars in Court precinct);
 2. Private
- c. CPA s29: Agreements from mediation may be given effect by court order
- d. s33: Mediator (like judge) can't be sued
- e. s30(4) what is said in mediation cannot be used as evidence in court proceedings
- f. *s29 & s30 would probably only apply to mediations that occur pursuant to CPA 2004.