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CHAPTER 1: COURT ADJUDICATION IN THE CIVIL JUSTICE SYSTEM

Right to a Fair Hearing

In 1980, Australia ratified the *International Covenant on Civil and Political Rights* (ICCPR). Art 14 states:

“All persons shall be equal before the courts and tribunals. In the determination of ... his or her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law”.

Court Suppression and Non-publication Orders Act 2010 (NSW)

S 3 — Definitions

“Non-publication order” means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

“Suppression order” means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

S 6 Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

8 Grounds for making an order

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) The order is necessary to prevent prejudice to the proper administration of justice,
- (b) The order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
- (c) The order is necessary to protect the safety of any person,
- (d) The order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),
- (e) It is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

CHAPTER 2: CASE MANAGEMENT AND THE OVERRIDING PURPOSE

Case Management

Judith Resnik in '*Managerial Judges*' (1982)

"Judges are not only adjudicating the merits of the issues presented to them by litigants, but also are meeting with parties ... to encourage settlement of disputes and to supervise case preparation. Before and after the trial, judges are playing a critical role in shaping litigation and influencing results".

Case management is an approach to the control of litigation, in which the court supervises or controls the progress of the case through its interlocutory phase. Over the last 10 years, case management by judges and quasi-judicial officers, such as registrars, has rapidly evolved in many Australian courts. These forms of case management involve the court managing the time and events involved in the movement of cases from commencement to disposition.

The objectives / elements of case management include (from textbook)—

- Reduction of trial time
- Monitoring of caseloads
- More effective use of judicial resources
- Early resolution of disputes
- Court consultation with the legal profession
- Strict control of adjournments

Civil Procedure Act 2005 s 57: Objects of Case Management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

- (a) The just determination of the proceedings,
- (b) The efficient disposal of the business of the court,
- (c) The efficient use of available judicial and administrative resources,
- (d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

Individual Docket System: Case management involves control by a judge, who personally monitors each case.

Master List System: Cases are controlled by the court registry and are assigned to different judges or judicial officers at different times for different purposes.

Differential Case Management: These systems are based on the idea that different types of cases need different types of management. DCM systems assign cases on the basis of their individual characteristics to designated procedural 'tracks', which may include prescribed time limits for case progress and different levels of judicial management. Cases are assigned on the basis of case characteristics such as subject matter and complexity.

New South Wales Supreme Court

Short Rundown on the NSWSC

The Supreme Court is the highest court in NSW. Established by the 1823 *Charter of Justice*, it now operates under the *Supreme Court Act* 1970 (NSW) and the *Civil Procedure Act* 2005 (NSW). It has unlimited civil jurisdiction and hears the most serious criminal matters. The Court has both appellate and trial jurisdictions. The appellate courts are the: Court of Appeal Court of Criminal Appeal.

The trial work of the criminal and civil jurisdictions is divided between two Divisions: the 'Common Law Division' and the 'Equity Division'. NSWSC has an inherent jurisdiction in addition to its specific statutory jurisdiction. The Court has supervisory jurisdiction over other NSW courts and tribunals, and generally exercises this jurisdiction through its appellate courts.

Common Law Division

Proceedings in the Common Law division are generally managed by way of directions hearings conducted by a judge or registrar. The court requires the parties to attend court for an initial directions hearing. Parties must file 'GCM' (General Case Management) documents before the initial directions hearing, containing a narrative of previous proceedings in the matter and the facts they intend to prove. **Different cases will have different requirements.**

Equity Division

Cases in the Equity Division include those in specialist lists (admiralty, commercial, protective and revenue matters, technology, and construction — NSW r 45.1). A registrar manages general matters through directions hearings, and lawyers must cooperate with the general management of the case, including the possibility of referral to mediation or constraints on expert evidence.

The Equity Division also includes family provision matters. Unless otherwise ordered, all proceedings involving a family provision application will be referred to mediation after the initial directions hearing, in order to reduce financial strain on estates.

Mediation — Civil Procedure Act 2005 (NSW)

S 26: Referral by court

(1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.

(2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.

S 28: Costs of mediation

The costs of mediation, including the costs payable to the mediator, are payable:

- (a) If the court makes an order as to the payment of those costs, by one or more of the parties in such manner as the order may specify, or
- (b) In any other case, by the parties in such proportions as they may agree among themselves.

Benefits of Mediation

- Early settlement assists in managing the workload of the courts
- Reduces costs of the parties and of the court
- Cases likely to settle early can be put on a track, which does not involve all of the preparation required to bring a case to trial

Overriding Objective

Civil Procedure Rules (UK) Part 1 Rule 1.1

Considered by HCA in *Expense Reduction Analysis Group v Armstrong Strategic Management and Marketing* (2013); NSWCA in *Halpin v Lumley General Insurance* (2009)

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

- (a) Ensuring that the parties are on an equal footing;
- (b) Saving expense;
- (c) Dealing with the case in ways, which are proportionate –
 - (i) To the amount of money involved;
 - (ii) To the importance of the case;
 - (iii) To the complexity of the issues; and
 - (iv) To the financial position of each party;
- (d) Ensuring that it is dealt with expeditiously and fairly;
- (e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- (f) Enforcing compliance with rules, practice directions and orders.

Overriding Purpose Clauses (Cth) & (NSW)

Federal Court of Australia Act 1976 (Cth) s 37M

The overarching purpose of civil practice and procedure provisions

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

- (a) According to law; and
- (b) As quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

- (a) The just determination of all proceedings before the Court;
- (b) The efficient use of the judicial and administrative resources available for the purposes of the Court;
- (c) The efficient disposal of the Court's overall caseload;
- (d) The disposal of all proceedings in a timely manner;
- (e) The resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

Civil Procedure Act 2005 (NSW) s 56: Overriding purpose

(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.

Civil Procedure Act 2005 (NSW) s 57: Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

- (a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

Sanctions by a Court

Civil Procedure Act 2005 (NSW) s 61: Directions as to practice and procedure

(3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

- (a) It may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
- (b) It may strike out or limit any claim made by a plaintiff,
- (c) It may strike out any defence filed by a defendant, and give judgment accordingly,
- (d) It may strike out or amend any document filed by the party, either in whole or in part,
- (e) It may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
- (f) It may direct the party to pay the whole or part of the costs of another party,
- (g) It may make such other order or give such other direction as it considers appropriate.

Procedural Appeals to the HCA

Adjournment

Brennan, Deane, and McHugh JJ: “In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. What might be perceived as an injustice to a party when considered only in the context of an action between parties, may not be so when considered in a context, which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources” — *Sali v SPC Ltd* (1993)

Amending a Defence

The primary judge refused to allow the defendant to amend its defence on the basis that it had discovered only recently that there were discrepancies between two copies of a lease that was in contention between the parties. The primary judge held that the amendment should be refused because it was only 6 months until the commencement of the hearing and the amendment would jeopardise the hearing dates. The defendant appealed to the HCA.

Dawson, Gaudron, and McHugh JJ held that the primary judge had erred, as the matters before her were insufficient to justify her refusal of the application to amend the defence. Case management (involving the efficiency of procedures of the court) is a relevant consideration, however should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties — *QLD v JL Holdings Pty Ltd* (1997)