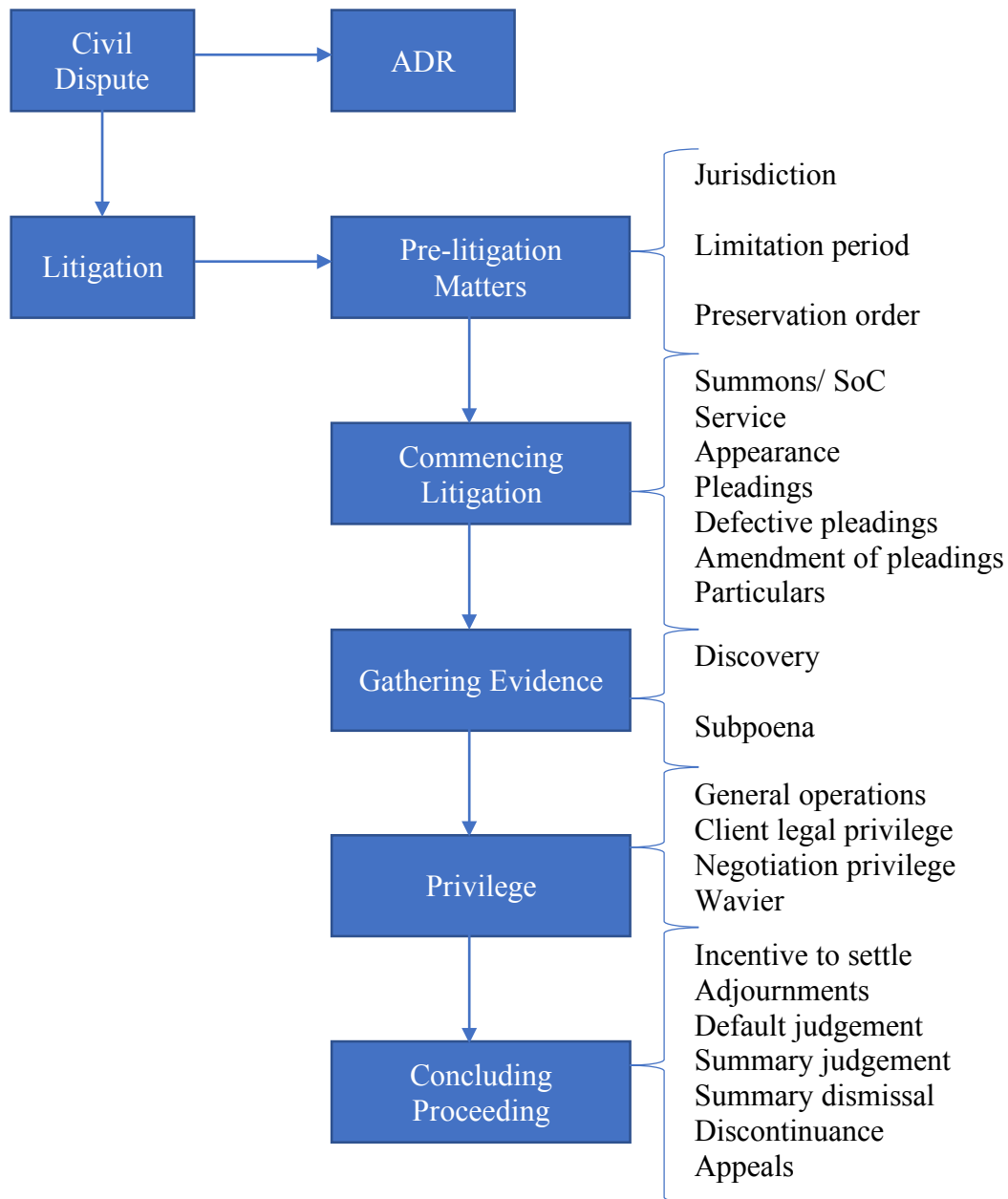


# Civil Procedure



CPA s56--overriding  
purpose:  
Just, Quick, Cheap

## Part A: General principles of civil procedure

### ➤ Procedure law

Substantial law is governed by the *lex loci delicti* (the application law is the law of the place where the wrongful act took place); Procedural law is governed by the *lex fori* (the application law of procedure and evidence the laws of the court which is hearing the claim).

⇒ E.g. **if the claim occurred in VIC but it is heard in NSW – the procedural law that applies is NSW and the substantive law that applies is VIC and common law.**

### ➤ Source of procedure law

1. Powers provided by statutes: (1) Uniform Civil Procedure Rules (UCPR); (2) Civil Procedure Act (CPA); (3) Court Rules; (4) Practice Notes
2. Inherent jurisdiction: Superior courts (e.g. the Supreme Court) have inherent power to prevent abuse of process
3. Implied jurisdiction: Lower courts (e.g. the District Court and Local Court) have implied power to do that which is required for the effective exercise of its jurisdiction; the “necessity” is subjected to the touchstone of reasonableness.

⇒ E.g. *Pelechowski v Registrar*

**Fact:** in a dispute regarding a loan agreement and land, an order restraining any dealing with the land was given against the two respondents (only one was presented when the order was given); The other one violated the order and was held in contempt. He appealed that decision on the basis that the District Court had no inherent jurisdiction to make that order.

**Held:** “Necessary” from *Grassby* is read not as “essential” but as “reasonably required”. However, the order in this case was beyond that broader meaning as well – it operated in the nature of an additional security which was not restricted by any undertakings by the appellant or anything. Thus, it was beyond the limited jurisdiction and is removed. The respondents WON!

### ➤ Principles of open justice and fairness

Open justice: justice is conducted out in the public

⇒ But: a court has the power to “close” justice under **s 71 of the CPA** (national security; protection of witness etc.)

Fair Trial: the function of providing proper notice is fundamental to the basic requirement of procedural fairness

⇒ *Stead v State Govt Insurance*

**Facts:** the trial judge told the plf’s counsel not to address one opposing witness’s evidence, so he did not. But the trial judge then based his decision on this unaddressed testimony to find in favour of the dft. The plf claimed that there was a miscarriage of justice since he was not allowed to argue his case properly.

**Held:** for a re-trial, an appellant needs to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it is necessary to show that a properly conducted trial could not have possibly produced a different result. (a new trial will not be ordered if the result is the same.)

⇒ *Mastronardi v NSW*

**Facts:** M was a prisoner who was assaulted by fellow prisoners. He brought proceedings in negligence against the NSW coz prison officers failed to provide protection against a threat of a physical attack. The claim was rejected and M alleged a miscarriage of justice.

**Held:** a court can order a new trial if it appears to the court that “some substantial wrong or miscarriage” has been occasioned. In this case, the plaintiff did not have a fair trial since part of the evidence was misapprehended and part was not relied upon.

➤ Case management

Case management is the idea that judges manage cases in order to avoid delay and excessive costs and give effect to the overriding purpose of CPA s 56.

⇒ Legislation

CPA s56-61

s 56: **the overriding purpose of the Act is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.** The courts have to give effect to the overriding purpose anytime for any case; any actions taken should serve the purpose and both parties have duties to assist the courts to achieve it.

s 57: Objective of case management—elaborate s 56(1).

s 58: Court to follow dictate of justice—relevant matters in determining the dictate of justice in a particular case s 58 (2)

s 59: Elimination of delay—satisfy the overriding purpose of quick

s 60: Proportionality of costs—satisfy the overriding purpose of cheap

s 61: General directions as to practice and procedure—the court may give order as it thinks fit for the speedy determination of the real issue s 61 (1)

UCPR Part 2

r 2.1: the court may give directions and make such orders for the conduct of any proceedings as appear convenient for the just, quick and cheap disposal of the proceedings.

r 2.2: the court may, of its own motion, appoint a date for a hearing anytime.

r 2.3: directions and orders may relate to any of the listed court processes for the purpose of case management.

⇒ Common law

Queensland v JL Holdings

**Facts:** in a dispute, the trial judge refused an application to amend pleadings by the defendant on the basis that it should have been done years ago (ie, delay).

**Held:** though case management is endorsed, individual justice is the dominant criterion and take priority over case management.

Since JL Holdings, the CPA was passed and in particular Part 6, which deals with the overriding purpose.

Aon Risk Service Australia Ltd v AUN

**Facts:** ANU commenced proceedings against three insurers, Aon was its insurance broker. On the third day of a 4-week trial of the action, AUN sought an adjournment

to amend SoC and to add a new claim against Aon. The trial judge awarded the adjournment, Aon appealed to HC.

**Held:** The HC stated that “In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone.” Speed and efficiency are essential to a just resolution of proceedings. There is no right to an indulgence, a cost order is not always sufficient to overcome the injustice of a party seeking an indulgence. Here, ANU had had sufficient opportunity to plead their case and it is too late for a further amendment having regard to the other party and other litigants awaiting in line.

Not all indulgences must be refused as the courts have to weigh the justice of the situation, an explanation for why an indulgence is needed is very important.

*Dennis v Australian Broadcasting Corp*

**Facts:** the respondent tried to invoke *JL Holdings* to amend its pleading for the fifth time. **Held:** since *JL Holdings*, the CPA has been passed and according to it the courts must seek to give effect to the overriding purpose. This means that there is a significant qualification of the power to grant leave to amend a pleading and other such applications.

Court is required to give weight to all three considerations.

*ERA v Armstrong*

**Facts:** ERA mistakenly provided privileged documents to Armstrong during the discovery. Armstrong’s solicitors refused to return those docs. ERA sought an injunction to refrain Armstrong from using those docs.

**Held:** The evident intention and the expectation of the CPA is to allow the court use these broad powers to facilitate the overriding purpose. Parties continue to have the rights to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose. Ordered Armstrong’s solicitors return docs and not to complex the issue and waste resources of the court.

## ➤ Alternative Dispute Resolution

⇒ Type of ADR

**Negotiation:** it involves no 3<sup>rd</sup> party and can be conducted by lawyers.

*Legal Procedure Uniform Law Australian Solicitors’ Conduct Rules 2015 r 2.7:* Every solicitor must inform the client about the alternatives to the proceedings.

**(Compulsory) Mediation:** there is a neutral 3<sup>rd</sup> party facilitates agreement between parties, it can be consensual or court mandated, the determination is not binding;

*CPA s 26:* the court may, by order, refer proceedings for mediation if the circumstance appropriate; *CPA s 27:* each party to proceedings that have been referred for mediation must participate in good faith; *CPA s 30(4):* evidence of anything said or any admission made in a mediation session is not admissible; any docs or copy of those prepared for the purpose of mediation is not admissible.

*Higgins v Higgins:* Dft opposed mediation, but mediation was still ordered. Because the Plf was an elderly woman with deteriorating health who cannot bear a long drawn out court process, the mediation would only take 1 day and minimise costs.

## *Limitation Act 1969 (NSW)*

### **Step1: Identify personal injury limitation period applicable**

For case of injury occurred after 05/12/2002:

*s 50C(1)*: (a) Discoverability of action—3 yrs running from when cause of action is discovered by P; (b) Long-stop—12 yrs running from the time of act/omission causing injury.

### **Step2: Ascertain at what date the cause of action was discoverable (objective test)**

*s 50D(1)*: a cause of action is considered “discoverable” by a person on the first date that he **knows or ought to know** of each of the following facts:

(a) The injury or death concerned has **actually occurred**

(b) The injury or death was **caused by the fault of the Dft**

- I. “**Fault**”-Person cannot be considered to be reasonably aware that a legal fault has occurred until they obtain legal advice (*Baker v NSW*).
  - “Obvious Fault”-if fault is so obvious that even a non-lawyer would be reasonably expected to recognise it, then legal advice is not necessary (*Frizelle v Bauer*)
- II. “**Caused by Dft**”-Legal definition of liability and attribution applies here. Therefore, person cannot be reasonably expected to know Dft caused injury until consultation with lawyer (*NSW v Gillett*)

<i>Claim</i>	<i>Limit period</i>	<i>Info</i>
<b>Personal injury (after 05.12.2002)</b>	➔ 3 yrs from the date on which the cause of action is discoverable by Ptf ( <i>date of discoverability</i> ) OR ➔ 12 yrs running from the time of the act or omission alleged to have resulted in the injury or death ( <i>12 yr long stop</i> ) ➔ whichever is the FIRST to expire	<u>Limitation Act s 50C(1)(a) or s 50C(1)(b)</u>
<b>Personal injury (before 05.12.2002)</b>	3 yrs from the date on which the cause of action accrues to the Ptf	<u>s 18A(2)</u>
<b>Contract</b>	6 yrs from the date on which the cause of action accrues to the Ptf	<u>s 14(1)(a)</u>
<b>Tort general</b>	6 yrs from the date on which the cause of action accrues to the Ptf	<u>s 14(1)(b)</u>
<b>Breach of trust or recovery of trust properties</b>	6 yrs from the date on which the cause of action accrues to the Ptf	<u>s 48</u>
<b>Cause of action founded on a deed</b>	12 yrs from the date on which the cause of action accrues to the Ptf	<u>s 16</u>
<b>Recovery of land</b>	12 yrs from the date on which the cause of action accrues to the Ptf	<u>s 27(2)</u>
<b>Defamation</b>	1 yr from the date of publication	<u>s 14B</u>
<b>Work injury</b>	3 yrs after the date on which the injury was received	<u>s 151D Workers Comp Act 1987</u>
<b>Motor accident</b>	3 yrs after the date of the motor accident	<u>s 109 Motor Accidents Comp Act 1999</u>