

1. INTRODUCTION TO CIVIL LITIGATION

WHAT IS CIVIL LITIGATION?

- **Private individuals / corporations** - disputes between private individuals or corporations on private law matters (contract, breach of duties); but not criminal law.
- **Private law**
- **Compare to criminal proceedings** - rules of procedure and evidence are the same in civil and criminal matters, but in criminal matters the burden of proof is greater because of the seriousness of consequences; ordinary standards of proof don't apply when the State is involved.
- **Civil disputes with the State** – eg. breach of contract for government services (NBN); State suing for civil penalties (eg. Tabcorp case – regulator Austrac enforcing AML/CTF laws).

Methods of Civil Dispute Resolution



SOURCES OF PROCEDURAL LAW

- Procedural law: rules which are directed to governing or regulating the mode or conduct of proceedings': *McKain v RW Miller* (1991) 174 CLR 1 at 26-27 per Mason CJ.
- Procedural law found in the **law of the forum** – applying the law of the jurisdiction where the dispute arose, not where it is heard.
- Compare to substantive law

Procedural law

- Procedural law ('adjectival law') is the law that governs the conduct of proceedings before the court and the way that rights and obligations are claimed or enforced.
- In contrast, substantive law defines legal rights and obligations, powers and liabilities.
- Governed by the *lex fori*, meaning the applicable laws of procedure and evidence of the court hearing the claim.
- Purpose to provide rules to facilitate dispute resolution based on procedural fairness or due process, promotes access to justice and addresses issues of cost and delay.

Sources of procedural law

1. **Civil Procedure Act 2005 (NSW) (CPA)**
2. **Uniform Civil Procedure Rules 2005 (NSW) (UCPR)**

- Both the CPA and UCPR apply in the Supreme, District and Local Courts
- Specific court acts and rules eg. *Supreme Court Act 1970*; *Supreme Court Rules 1970*
- Practice notes – eg. for particular lists
- Rules of evidence – *Evidence Act 1995* (NSW) and common law.
- Inherent jurisdiction (SC) and implied jurisdiction (DC, LC)
- NB: Courts which have inherent jurisdiction have power inherited from the UK System (eg. abuse of court's process). Implied jurisdiction is the court's power to do what is necessary for what it is required to do under statute.

ADVERSARIAL SYSTEM OF LITIGATION

Litigation

Characteristic	Description
Procedural protections	<ul style="list-style-type: none"> Impartial adjudicator, reasoned decisions, open justice, notice and an opportunity to be heard and present a case based on evidence and argument
Urgent relief	<ul style="list-style-type: none"> Interim / interlocutory injunctions Freezing orders Search orders
Compelling disclosure of information	<ul style="list-style-type: none"> Compulsory disclosure of information is critical where the dispute cannot be resolved until information possessed by one party is made available to the other party to level the playing field. Assists the efficient resolution of the dispute by narrowing issues and assisting parties to identify the issues in dispute. Eg. preliminary discovery to assist the applicant ascertain (a) the identity / whereabouts of the prospective defendant, or (b) whether or not the applicant is entitled to make a claim for relief.

Adversarial System vs. Inquisitorial Systems of Civil Litigation

Features	Adversarial system	Inquisitorial system
Role of parties	<ul style="list-style-type: none"> Party controlled dispute 	<ul style="list-style-type: none"> Judge directs the inquisition
Role of judge	<ul style="list-style-type: none"> Reactive, impartial judge (umpires) 	<ul style="list-style-type: none"> Judge's role is both proactive and inquisitive
Cost	<ul style="list-style-type: none"> More costly to hear both parties arguments 	<ul style="list-style-type: none"> Possibly less costly
Rules of civil procedure	<ul style="list-style-type: none"> Use of precedent, procedural rules and laws of evidence Reliance on oral testimony from witnesses and subject to cross-examination 	<ul style="list-style-type: none"> Main sources of law are codes w/ commentary from legal scholars Minimal rules of courtroom practice Emphasis on documentary proof (not cross-examination)
Trials	<ul style="list-style-type: none"> Use of trial transcript for appeals 	<ul style="list-style-type: none"> No rigid separation b/w trial and pre-trial phases No use of transcript to record court proceedings
Hybrid features	<p>Inquisitorial features exist in the adversarial system</p> <ul style="list-style-type: none"> Case management Commissions – eg. Lindt siege Coronial Inquest; Royal commission – child sexual abuse; Don Dale Detention Centre 	

Criticisms of adversarial systems

- Cost – power imbalances; access to justice.
- Reforms – changes in case management
- Cards on the table approach – now discouraged in the adversarial system – [Nowlan v Marson Transport \(2001\)](#) [NSWLR](#)

Principle of Open Justice

- Open justice
 - 'The paramount duty of the courts in administering justice according to law is to ensure that justice is done... Publicity of proceedings is one for the great protections against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially – [R v Richards & Bijkerk \(1999\)](#) per Spigelman CJ
- Various way in which and reasons why the Court might depart from the principle of open justice
- Statutory and common law power to depart from the principle of open justice
- [Hogan v Hinch \(2011\)](#) – refer to French CJ – not absolute principle, eg. secret technical process, national security.
- [Wainou v NSW \(2011\)](#) – the provision for reasons for a decision is an expression of the open court principle

Principle of a Fair Trial

- Applies in civil and criminal proceedings: [Banque Commerciale SA \(in liq\) v Akhil Holding \(1990\)](#) (civil); [Dietrich v R \(1992\) 177 CLR 292](#); [Jago v District Court of NSW \(1989\)](#) (criminal)
- No bill of rights in Australia; no statutory right to a fair trial in NSW (contrast Article 14, ICCPR; s 21, *Human Rights Act 2004* (ACT); s 24, *Charter of Human Rights and Responsibilities Act 2006* (VIC))
- Inherent power of a court to control its own processes – [Walton v Gardiner \(1993\) 177 CLR 378](#) per Mason CJ, Deane and Dawson JJ.
- Aspects of a fair trial
 - Reasonable opportunity to present a case
 - Hearing rule
 - Reasonable notice of the case a person has to meet
- A miscarriage of justice caused by a failure of a trial judge to provide a fair trial: [Stead v State Government Insurance Commission](#)
 - Held: If a parties is denied submissions that would not have been affected the decision, no appeal allowed. However, if appeal is related to credibility of witnesses, then appeal court is not in a position to conclude that the plaintiff's counsel had been given an opportunity to make submissions to make a possible decision. On factual matters – held it could.
- Provision of reasons for decision – critical component.

THE CROWN AS A 'MODEL LITIGANT'

- Lawyers acting for the government are required to ensure their client acts as a model litigant. As observed in [Melbourne Steamship Co v Moorehead \(1912\)](#), there is a "standard of fair play to be observed by the Crown in dealing with its subjects." HCA found that the Crown should not take a 'purely technical point of pleading.'
- The courts expect the Crown to pursue the public interest when it appears as a litigant: [Hughes Aircraft Systems International v AirServices Australia \(1997\)](#). Ie. 'the Crown should act fairly towards those with whom it deals at least insofar as this is consistent with its obligation to serve the public interest for which it has been created'
- Refer to the **NSW Model Litigant Policy for Civil Litigation**, p 58-60.

KEY FEATURES OF THE JUDICIAL FUNCTION

Overview of key features

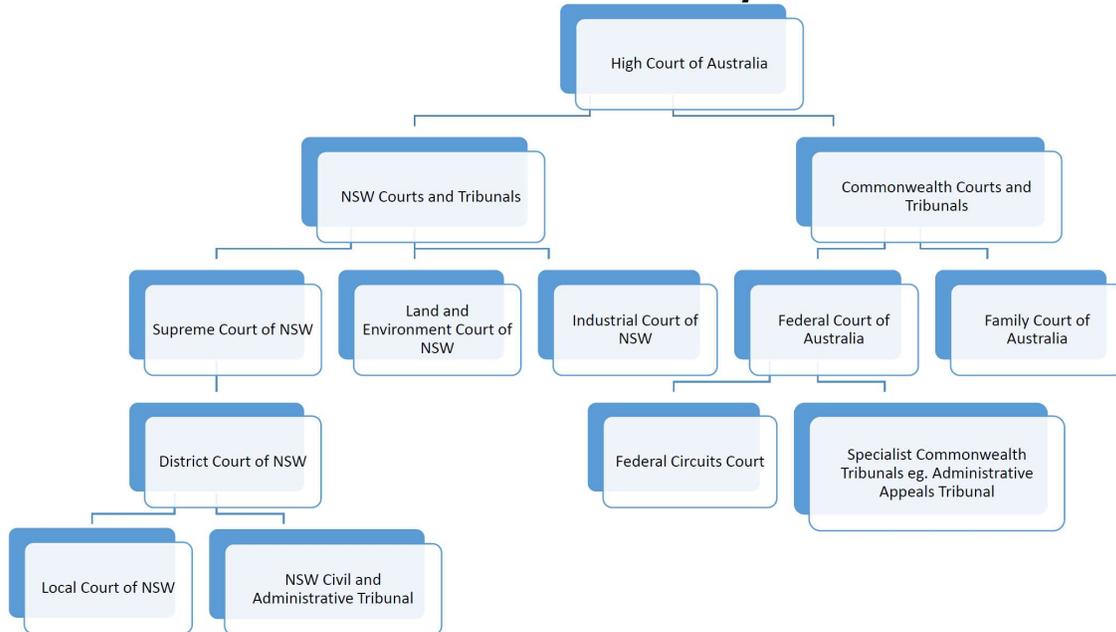
- Why do we need litigation?
- **Primary function of the Courts** – to administer justice according to law
- **Exercise of judicial power** – to make binding and authoritative decisions; enforcement
- **Judicial independence** – rule of law, NB: see Supreme Court website for speeches by judges on this.
- **Judicial impartiality** – actual vs. apprehended bias, where to a lay observer it appears there is some bias.
- **Fact finding** – judge determines the facts based on the evidence presented by the parties; judge cannot take a frolic of their own.
- **Principle of finality** – *res judicata* – if a particular cause of action is brought, an individual cannot bring it again.

Summary of key features

Key Features	Description
Distinctive role of the judge	<ul style="list-style-type: none"> The essential role of the judge is to finally determine controversies between private parties or between the state and its citizens by due application of the law. A judge is judicial officer of a court within an institutional system of judge. Characteristically, judicial process is open and performed in the public interest. The judicial function is central to the administration of justice and is an essential element of the rule of law.
What is a court?	<ul style="list-style-type: none"> The judicial function is one of the three branches government defined by the Constitution and subject to the separation of powers doctrine; legislative, judicial and executive branches. The Australian states do not have strict separation of powers doctrine, however in <i>Kable v DPP (NSW)</i>, the HCA held permissible functions of state courts may be invested with federal jurisdiction. A court under the Constitution, exercises judicial power that are not inconsistent with the judicial function. The judge is an institutional embodiment of the court.
What is judicial power?	<ul style="list-style-type: none"> Judicial power is 'the power which every sovereign authority must have to decide controversies.. whether the rights relate to life, liberty or property' There is no cohesive or comprehensive statement as to what constitutes judicial power because factors depend on individual cases and features are not conclusive. Key indicia – judgement; punishment; enforcement of decisions.
Judicial independence	<ul style="list-style-type: none"> Independence from influence by other branches of government and litigants is fundamental to the institutional integrity of the judicial system, and the most important feature of the rule of law. Requires judges to be free to determine cases according to law and not to be constrained in their decision-making by political approval or pressure. Security of tenure is a central structural pillar of judicial independence – protects judges from removal from office except by extraordinary means, ie. address in Parliament seeking removal on ground of 'proved misbehaviour or incapacity.'
Judicial Impartiality	<ul style="list-style-type: none"> Judge is disqualified from hearing a case 'if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question' Threatens actual and apparent independence and impartiality of the judiciary – ie. integrity of the court.
Procedural fairness	<ul style="list-style-type: none"> Overarching principle is that parties to litigation are entitled to a fair trial.
Judicial Fact-Finding	<ul style="list-style-type: none"> Facts are limited to those proved by evidence or found pursuant to common knowledge (doctrine of judicial notice).
Duty to Give Reasons	<ul style="list-style-type: none"> Judges have an obligation to give reasons as 'an incident of the judicial process' and 'paramount to judicial duty' This enhances public confidence in the judicial process and provides a mechanism for judicial accountability. Provides the means for the common law system of precedent, and proper functioning of the appellate system. Reasons must be sufficient to indicate that the judge has properly considered the case advanced and why they accepted or rejected particular substantive issues.
Principal of Finality	<ul style="list-style-type: none"> Once resolved, controversies are not to be reopened except in limited circumstances. Orders of a superior court are valid and must be obeyed unless and until they are set aside: <i>NSW v Kable</i> Underlies judicial immunity from suit, protects a judge from liability in exercise of judicial discretion.
Judicial Law-Making	<ul style="list-style-type: none"> Incremental – existing principles are derived from prior cases are extended by application to novel but analogous situations.

OVERVIEW OF NSW COURTS SYSTEM

The Federal and NSW Court System



- Some overlap – NSW Supreme Court has overlapping jurisdiction with federal courts – eg. misleading & deceptive conduct, s 18.
- High Court of Australia
- Federal courts
 - Family Court of Australia – has an appeals
 - Federal Court of Australia– IP; competition; corporations; price fixing
 - Federal Circuits Court – refugee appeals; immigration
 - Specialist Commonwealth Tribunals – Administrative Appeals Tribunals (AAT)
- State courts
 - Supreme Court of NSW
 - District Court of NSW
 - Local Court
 - NSW Administrative Tribunal (NCAT)

