

Civil Practice Study Notes

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1. Introduction to civil practice and procedure

Court adjudication in the civil justice system

- While Australian civil procedure is still predominantly modeled upon the adversarial system, the last two decades have been characterised by an increasing interest in mitigating party control of litigation
- Civil procedure: law that governs the conduct of proceedings before the court; that is, 'the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right' (Poyser v Minors (1881))
- Seen primarily as a process for the resolution of civil disputes.
- 'First, civil proceedings serve to demonstrate the effectiveness of the law; secondly, they provide the opportunity for the judges to perform their functions of interpreting, clarifying, developing, and of course applying the law' (J A Jolowicz)
- The operation of the Australian civil justice system
- Entrenched norms: principle of open justice – fundamental aspect of the system of civil law and the conduct of proceedings in public is an essential quality of an Australian court of justice.
- The phrase 'open court' refers to a place where the public has a right of admission and where an interested member of the public has a right of free access to the matter being heard there (Dando v Anastassiou)
- Exception to the principle of open justice: there is no inherent power of the court to exclude the public (John Fairfax Publications Pty Ltd v District Court of NSW). However there are many common law (Rinehart v Welker) and statutory exceptions
- 5 things you need to know when going to court:
 - o **What do you want?**
 - o On what basis will court grant you what you want?
 - o What will work for you and what will work against you (bring up what works against you)
 - o Do you need evidence to support the claim you're making – probably
 - o Does the court have any particular rules/practice notes governing what you're about to do
- Procedural v substantive law

Procedural Law	Substantive Law
<ul style="list-style-type: none">- Procedural law is the law that governs the method by which rights are sought to be enforced- Rules of procedure are at least as important as the substantive law- Recourse to procedural law is voluntary- Procedural law creates choice for the parties- Even where a procedural law is mandatory in form, if the opponent chooses to do nothing about it, nothing will happen	<ul style="list-style-type: none">- Substantive law defines legal rights, duties, powers and liabilities- Subjection to substantive law is involuntary- The person... possessed of a substantive right is not compelled to enforce it by litigation- Substantive law is self-executing

- “In many case rules of procedure may in fact prove to be more important than substantive law as civil procedure rules operate to dictate;
 - The manner of determination of the facts in issue,
 - The law to be applied,
 - The way in which the law is applied to the facts and
 - The available remedies.”
- Bathurst Chief Justice Supreme Court NSW
- Less on proceedings and court documents – focus of subject is now more on procedure
- Conduct comes into: allowing adjournment, striking out a ruling – conduct is very important
- **New South Wales**
 - Civil Procedure Act 2005 (NSW)
 - Uniform Civil Procedure Rules 2005 (UCPR)
 - Court Practice Notes
- **Federal Courts**
 - Judiciary Act 1903 (Cth)
 - Civil Dispute Resolution Act 2011 (Cth)
 - Federal Court of Australia Act 1976 (Cth)
 - Federal Magistrates Act 1999 (Cth)
 - Court Practice Notes
- ***Civil Procedure Act 2005 (NSW)***
 - Knowing sections isn’t enough, need to be able to interpret them as well
- **Pt 2** - Administrative matters
 - Division 1 - Rules, practice notes and forms
- **Pt 2A** - Steps to be taken before the commencement of proceedings
- **Pt 3** - Commencing & Carrying on Proceedings Generally
- **Pt 4** - Mediation
- **Pt 5** - Arbitration of Proceedings
- **Pt 6** - Case Management
 - Division 1- Guiding Principles
 - Division 2 & 3 Powers of the Court

Guiding principles when exercising any power

- Part 6 Division 1 – Guiding Principles
 - **s56** - overriding purpose - to facilitate the **just, quick and cheap resolution** of the real issues in the dispute or proceedings
 - **s57** - objects of case management - the **efficient disposal of the business** of the court
 - **s58** - the court must seek to act in accordance with the **dictates of justice**
 - **s59** - practice and procedure should be implemented with the object of **eliminating any lapse of time**
 - **s60** - the cost to the parties is **proportionate** to the importance and complexity of the subject-matter in dispute