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Overview

Definitions

Procedural Rules: “rules which are directed to governing or regulating the mode or conduct of proceedings” [McKain v RW Miller].

Procedural law: relates to the method and process used to enforce a right

Substantive law: the actual law or rules that are the subject of the enforcement.

- Matters that on the face concern the rights and duties of the party are the substance of the matter not the procedure [John Pfeiffer].

Procedural v Substantive

Procedural rules are determined by the court hearing the matter, the law of the forum applies regardless of which substantial law is being applied = Law of the forum (*Lex fori*).

Rationale of distinguishing procedural rules from substantive rules:

To provide procedural fairness to the parties to litigation. (by providing certainty to the process for all parties).

- Fairness of process increases the legitimacy of the judicial system [Dame Hazel Glen].

To promote access to justice and achieve the purpose of litigation.

“Procedural rules are the means by which substantive rights are enforced” [Dame Hazel Glen – Judging Civil Justice’].

Underlying Principles

Principle of Procedural Fairness:

- Need a reasonable opportunity to present case.
- Hearing rule.
- Reasonable notice of the case a person has to meet.
- A miscarriage of justice may occur where there is a failure to provide a fair trial. [Stead].

Principle of Open Justice:

- Publicity is a protection against the exercise of arbitrary power. [R v Richards].
- Court can depart from this principle if circumstances require.
- Judicial Reasons big part of open justice.

Sources of procedural law

Civil Procedure Act 2005 (NSW).
Uniform Civil Procedure Rules 2005 (NSW).
Supreme Court Act 1970 (NSW).
District Court Act 1973 (NSW).
Local Court Act 2007 (NSW).

Supreme Court Rules 1970.
District Court Rules 1973.
Local Court Rules 2009.
Evidence Act 1995 (NSW).
Practice Notes.

Inherent Jurisdiction

- Superior Court of Record (Supreme Court in NSW) has the power to govern processes and prevent abuse of process, this power is derived from the power invested from England at the establishment of the Supreme Court [Jago].

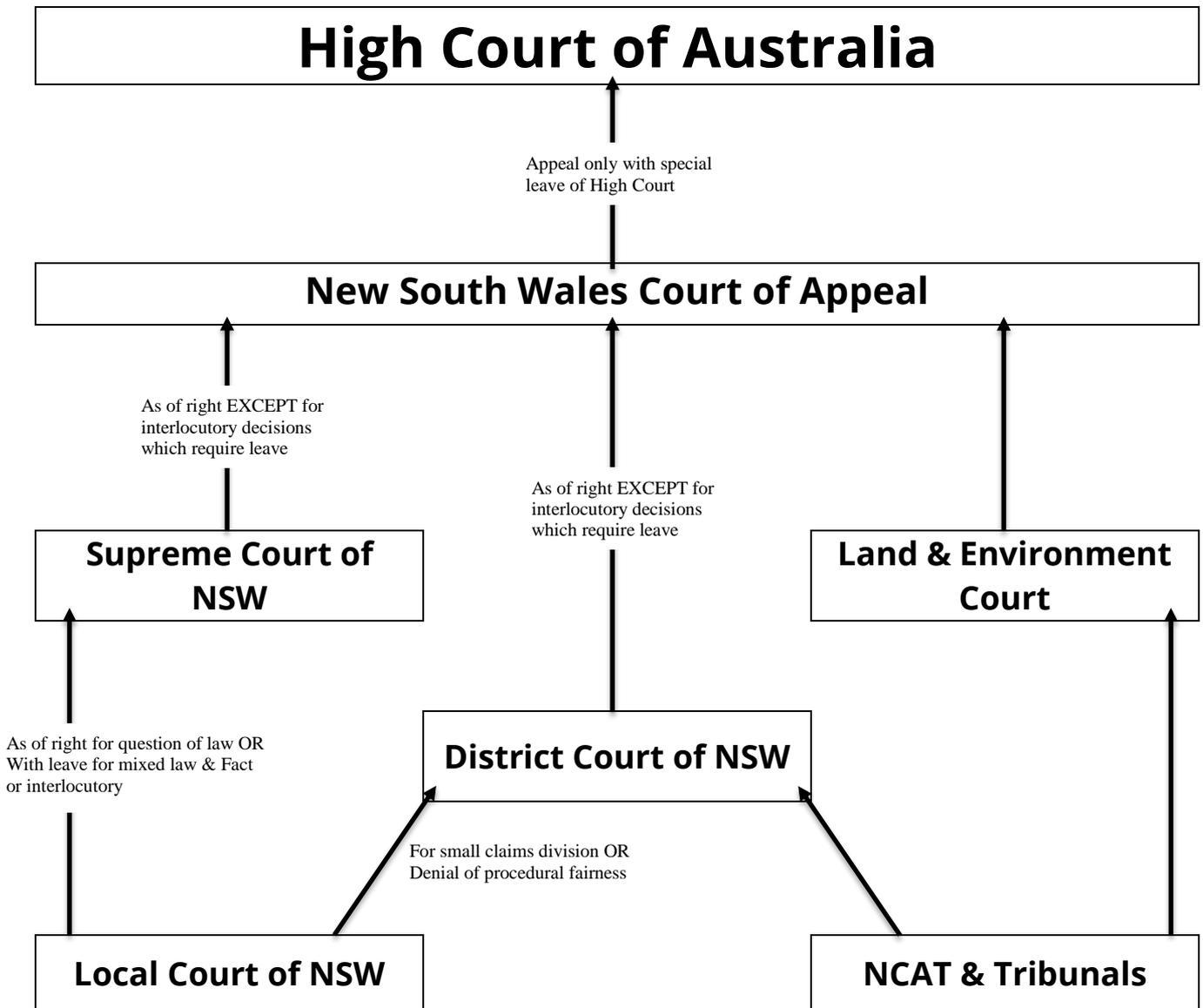
Common Law Rules of Evidence

- Common law rules are largely replaced or replicated in legislation.

Implied Jurisdiction

- District Court and Local Court have limited jurisdiction which can be implied from statutory provisions which grant certain jurisdiction (i.e. this implied jurisdiction is required for the court to effectively perform the functions it has been granted under statute) [Grassby].
- The statutory Court has the power to that which is “really necessary to secure the proper administration of justice in the proceedings before it” [J Fairfax].

The NSW Civil Court System



Case Management

Civil Procedure Act 2005 (NSW); Part 6, Division 1 - Guiding Principles

Section 56 – Overriding Purpose

- Overriding purpose of the CPA is to “**facilitate the just, quick and cheap resolution of the real issues in the proceedings**” s 56(1).
- The court must seek to give effect to that purpose when exercising any power or interpreting any provision of this act or any other court rules s 56(2).
- Parties are under a duty to assist the court to further the overriding purpose, by participating, and by complying with orders of the court s 56(3).
- Legal professionals are also under a duty to ensure that their clients do not breach that duty s 56(4).
- Court can consider any breach of (3) or (4) when using discretion to determine costs s 56(5).

Section 57 – Objects of Case Management

- Objectives for court to further overriding purpose through case management.
 - o Just determination of proceedings s 57(1)(a).
 - o Efficient disposal of the business of the court s 57(1)(b).
 - o Efficient use of resources s 57(1)(c).
 - o Timely disposal of proceedings at a cost affordable by the parties s 57(1)(d).
- The CPA and court rules are to be construed and applied to best ensure to attainment of the objectives of case management s 57(2).

- The effect of the overriding purpose is that now the court must also balance the issues of delay and costs against the more traditional purpose of providing a forum for the just determination of the issues.
- The overriding purpose is applied by the balancing the competing requirements of sections 58, 59 & 60.

Section 58 – Dictates of Justice

- Court must act in accordance with the dictates of justice; s 58(1)(b) when making any order or direction for the management of proceedings; [four matters] s 58(1)(a).
 - o Amendment of documents; s 58(1)(a)(i).
 - o Adjournment or stay s 58(1)(a)(ii).
 - o Any other procedural order s 58(1)(a)(iii).
 - o Any direction under Div 2 s 58(1)(a)(iv).
- How does the court determine what the dictates of justice are? s 58(2).

- Must have regard to s 56 & s 57 s 58(2)(a).
- May consider the following s 58(2)(b).
 - o The complexity of the matter s 58(2)(b)(i).
 - o The degree of expediency shown by the parties s 58(2)(b)(ii).
 - o Any lack of expediency which is beyond the control of the parties s 58(2)(b)(iii).
 - o Degree to which the duty under s 56(3) has been fulfilled s 58(2)(b)(iv).
 - o The use of opportunities that arise during proceedings s 58(2)(b)(v).
 - o The injustice that may be incurred s 58(2)(b)(vi).
 - o *Anything* else the court considers relevant s 58(2)(b)(vii).

Section 59 – Elimination of Delay

- In any proceedings, the practice and procedure of the court should be implemented with the object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial.

Section 60 – Proportionality of Costs

- In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.