

1. Open Justice and Fairness
 - Case Management
 - Alternative Dispute Resolution – ADR
 - Costs and Ethics

Sources of Procedural law: CPA, UCPR

| LOCAL COURT | DISTRICT COURT | SUPREME COURT |
|---|--|---|
| Small claims division: up to \$10k -s29(1)(b) | Civil and criminal matters | Unlimited civil jurisdiction. Most serious criminal matters. |
| General division: \$10-100k - s29(1)(a) For personal injury or death claims: limit of \$60k - s29(2) | Civil jurisdiction: limit of \$750k | Common law division: civil matters where more than \$750k is claimed. Criminal and administrative law matters. |
| Can also hear criminal summary prosecutions, committal hearings, mental health issues, some family law matters, children’s criminal proceedings, juvenile prosecutions and care matters, licensing and coronial matters | Unlimited jurisdiction in claims for damages for personal injuries arising out of motor vehicle accidents or work injuries | Equity division: commercial law, corporations law, equity, trusts, probate, family provisions legislation. Appellate divisions: Court of Appeal, Court of Criminal Appeal. |
| Local Court Rules 2009 | District Court Rules 1973 | Supreme Court Rules 1970 |
| Local Court Act s29: jurisdictional limits as above. | District Court Act s9, s166: Jurisdiction of the court generally. S9(1) in civil and s9(2) in criminal. | Supreme Court Act s23: Jurisdiction of the court generally |
| | | Practice Notes |
| Inherent and implied power of courts to regulate their processes, and prevent an abuse of process. | | |

Open justice and tensions p16

- Conduct of proceedings in public is an essential quality of Australian court of justice. No inherent power of the court to exclude the public. (John Fairfax v District Court of NSW)
- Paramount duty of the courts is to ensure that justice is done. All else is subservient to the discharge of this duty. Publicity of proceedings protects against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially. The privilege belongs to the public generally. Only in wholly exceptional circumstances, presence of public is likely to defeat the paramount duty, that the courts may proceed in camera. (R v Richards & Bijkerk).
- Justice must not only be done but be seen to be done (R v Sussex Justices; ex parte McCarthy)
- As with many fundamental legal principles, open justice is often at tension with well-meaning exceptions. Just as the administration of justice normally requires litigation to occur in the open, so may it occasionally necessitate closed hearings in cases of confidential information, child-related matters and where issues of national security arise, protect the identity of an informer (Witness v Marsden). While these exceptions are ‘strictly defined’ (R v Tait), common law and statute make allowances for private proceedings or the issuance of various orders to a similar effect
- s71 of CPA: permits a judge to close the court to the public, together with the court’s inherent or implied jurisdiction for civil cases. Court Suppression and Non-publication Orders Act 2010.

- Departure from open justice will only be permitted if it is 'really necessary to secure the proper administration of justice'. (John Fairfax & Sons Pty Ltd v Police Tribunal of NSW)
- It must be more than 'convenient, reasonable or sensible, or to serve some notion of the public interest' (Hogan v Australian Crime Commission) As the Victorian Open Courts Bench Book bluntly puts it, 'necessity is a high threshold'.
- 'mere embarrassment, distress or damage by publicity is not a sufficient basis to grant such an application. (Corfield, Hankin cases, Kirby P in John Fairfax v Local Court of NSW).
- Mining magnate Gina Rinehart launched a barrage of applications for suppression orders in a litigious feud with her children over control of the family trust. Most of these orders were sought under the Court Suppression and Non-Publication Orders Act 2010 (NSW)

Rinehart v Rinehart [2014]

Initially, suppression orders were granted: publication would 'negate the purpose of the confidentiality provisions in the [disputed] Deed', and was further of the belief that 'the public interest in open justice may attract less weight where private issues and interests are concerned'. But the full bench of the Court of Appeal, however, disagreed: the lower courts had given too much weight to preserving the effectiveness of the deed. Bearing in mind 'the requirement to treat open justice as "a primary objective"' and that 'the proper conduct of trustees is a matter which warrants close public scrutiny', the full bench held that the test of necessity was not fulfilled. As the judges said, '[i]t is the price of open justice that allegations about individuals are aired in open court.' Special leave to appeal that decision was refused by the High Court.

Principle of a Fair Trial p51

Requirements of a fair hearing: provision of a reasonable opportunity of presenting his or her case.

Imposition of the onus of proof, differentiation of the standard of proof between civil and criminal proceedings – provides an understanding of what fairness requires in the particular circumstances. When an adjournment is appropriate, order of proceedings, right of cross-examination. (J Spigelman in "the Truth can cost too much: the principle of a fair trial" 2004 ALJ.

Providing proper reasonable notice is fundamental to the basic requirement of procedural fairness (Banque Commerciale SA v Akhil Holdings)

Miscarriage of justice caused by a failure of a trial judge to provide a fair trial – due to acceptance and rejection of the testimony of a witness at the trial → appeal allowed and ordered a new trial (Stead v State Govt Insurance Commission)

The P did not have a fair trial in the hearing here part of the evidence was misapprehended and part was not relied upon, thereby constituting a miscarriage of justice, and something other than 'a hearing where the ev given is to be given proper, genuine and realistic consideration in the decision subsequently to be made' (Mastronardi v NSW).

It is in the interests of a fair trial that litigation should be conducted on the footing that all relevant documentary evidence is available. Hence the existence of legal professional privilege which reflects the paramountcy of this public interest (AFP v Propend).

Case Management

-Justice delayed and justice denied p72

-Case management to minimise cost –but may also generate or front-load costs as it requires parties to take additional or more comprehensive steps – court fees, legal fees, lost time and diverted resources.

-CPA s56(1) overriding purpose – to facilitate the just, quick and cheap resolution of the real issues; s56(2) court must give effect to the overriding purpose when it exercises any power.

-Reasons for case management – case management by court is required in all civil proceedings:

- 1) Reduce Delays –Avoid issues with witnesses & evidence –Reduce court backlogs
- 2) Reduce Costs –Promote access to justice –Avoid costs being used as tactical weapon by well-resourced parties –Danger that case management can increase costs by front-loading previously avoidable costs
- 3) s57 CPA Objects of case management: (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.

- 4) S58(1) CPA: Court to follow dictates of JUSTICE in deciding whether to make any order or direction, including (i) any order for amendment of doc, (ii) any order granting an adjournment or stay of proceedings, (iii) any order of a procedural nature.
- 5) S59 CPA: Elimination of delay – QUICK – object of eliminating any lapse of time between commencement of proceedings and final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues.
- 6) S60 CPA: Proportionality of costs - CHEAP – Resolve the issues in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.
- 7) UCPR rule 2.1 just, quick, cheap; rr 2.2 and 2.3 court may appoint date, give directions or orders in its case management.

Leading cases on case management

AON Risk Services v ANU p107

-ANU reached settlement with the insurers, but sought an adjournment and application for leave to amend claim to add a new claim against AON (insurance broker).

-[94] The ultimate aim of the court remained the attainment of justice. Where a party had a sufficient opportunity to plead his/her case, it may be necessary for the court to make a decision which may produce a sense of injustice in that party, for the sake of doing justice to the opponent and to other litigants.

-[95] What may be just, when amendment is sought, requires account to be taken of other litigants, not just the parties to the proceedings in question.

-[96] Does not approve of JL Holdings that a party should be permitted to amend to raise an arguable issue subject to payment of costs arising from the amendment. – more accurate to say that parties have the right to invoke the jurisdiction and powers of the court in order to seek a resolution of their dispute – further amendment of a claim is dependent upon exercise of the court's discretionary power.

-[98] A just resolution remains the paramount purpose, with minimum delay and expense i.e. speed and efficiency. Limits may be placed upon re-pleading, an order for costs may not always provide sufficient compensation and therefore achieve just resolution → Wrong to say that a just resolution requires a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.

-[102] If a party has had sufficient opportunity to plead their case, It may be too late for further amendment, having regard to the other party and other litigants awaiting trial dates – extent and effect of delay and costs are important in the exercise of the court's discretion – will require an explanation to be given where there is delay in applying for amendment. – need to show their application is brought in good faith, bring the circumstances giving rise to the amendment to the court's attention, so that they may be weight against the effects of any delay and objectives of the UCPR rules.

Queensland v JL Holdings 1997 p85

Although case management was endorsed, individual justice was the dominant criterion to allow the applicants to amend their defence.

QLD sought leave to amend its pleadings – would require more discovery, probably a longer trial, delayed the start date of the trial.

ERA v Armstrong p110 - Overriding purpose in s56 and court's power to give directions in s61

ERA inadvertently provided documents subject to client legal privilege to Armstrong, Armstrong declined to return the privileged documents, asserted any privilege attached to the docs had been waived

-[56] duty of the parties and their lawyers to assist the court in furthering the overriding purpose in CPA s56.

-[55] referred to s61 of CPA that the court has the power to give directions as it thinks fit for the speedy determination of the real issues, direct the parties to take specified steps.

-[58] referred to s64(1)(a) empowers the court, at any stage of the proceedings, to order that any document in the proceedings be amended, s64(2) provides for all necessary amendments to determine the real