

Civil Practice Notes

Summary of Civil Procedure

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1. Civil procedure laws govern the conduct of civil proceedings before the court. Civil procedure laws operate in the service of achieving justice and contribute to public understandings of justice and substantive rights.
2. Key legislation: *Civil Procedure Act 2005 (NSW)*; *Uniform Civil Procedure Rules 2005 (NSW)*
3. Guiding principles of civil practice: ‘quick, just and cheap’, impacts on conduct of parties, conduct of solicitors and judges’ case management decisions
4. Case management: shift to ‘managerial judging’; ongoing involvement of judge throughout case; judicial orders relating to case management must uphold overriding purpose & consider interests beyond the individual interests of the parties.

What is Civil Procedure?

Procedural law is the law that governs the conduct of proceedings before the court. Procedural law is “rules which are directed to governing or regulating the mode or conduct of court proceedings”; *McCain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 at 26-27 per Mason CJ*. It is the mode of method of proceeding to enforce a right, it is not concerned with the law that establishes or defines the particular right.

Purposes of civil procedure:

- Provide institutions and rules which facilitate dispute resolution
- Perpetuate the rule of law
 - State can show that the government is not exercising arbitrary power over its citizens
 - Clear and transparent proof of the state in the way which it operates
 - Ensures consistency and structure
 - Important communicative function which impacts on societies, individual dispute resolution
 - Practical, economic and bureaucratic functions
- Mediate flow of litigants

Perspectives of Procedural Law vis-à-vis Substantive Law

Procedural law doesn’t create any additional rights. Some have argued that procedural law shapes what we understand our rights to be – courts are needed to enforce the rights.

- Subsidiary to or supportive of substantive law
- ‘Trans-substantive’
- In the service of achieving justice
- Informs the rights and interests embedded in substantive law
- Has its own norms and values and as such can transform the requirements and meaning of substantive law

Adversarial v Inquisitorial Justice Model

The function and operation of civil procedure is contingent to the model of justice. Civil justice

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reforms in NSW have increased role of court in shaping and pacing litigation.

- Adversarial Characteristics
 - Common law applies to all legal persons
 - Trial is distinct and separate end point to litigation process
 - Court room process subject to rigid rules
 - Proceedings controlled by parties
 - Emphasis on oral arguments – judiciary has more reactive role
 - Expanding to possess more inquisitorial aspects – particularly in relation to the role of the judge
- Inquisitorial Characteristics
 - State officials performing most activities in pre-trial and trial phases
 - Deductive form of reasoning – pre-existing general statements of law that are applied to specific circumstances
 - No rigid separation between pre-trial and trial phases
 - Procedural rules meant to be minimal and uncomplicated
 - Lawyers are not the central role in the inquisitorial process

Sources of Civil Procedure Law

- Legislature: Supreme Court Act 1970 (NSW); Civil Procedure Act 2005 (NSW)
 - Section 4 of CPA says that all civil proceedings in Supreme Court, Industrial, Land and Environment Court, Local Court
- Executive: Uniform Civil Procedure Rules 2005
 - Important source of civil procedure
 - Key document referred to for providing mechanics of litigation and making applications – provides in-depth outlook into general rules in the process of litigation
 - Does not override inherent jurisdiction
- Courts: inherent jurisdiction (superior courts); judicial decisions
 - Court practice notes - commentaries by officers of court to assist parties in litigation that are issued on a specific aspect of civil procedure (e.g. use of litigation technology, mediation, etc.)

Inherent Jurisdiction

Inherent jurisdiction allows courts ‘to properly exercise their powers, perform their functions and to control abuse of process’: *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264. It enables courts to function effectively while litigation is occurring, puts in place frameworks that prevent parties from abusing court process, and avoids any unnecessary legal costs where a judgement can’t be enforced after a court has made a decision.

- Examples:
 - Security for costs orders
 - Asset preservation orders
 - Search and seizure orders

Overriding Purpose – ‘Just, Quick and Cheap’

- Operation of CPA in relation to civil dispute must always be meeting the three objectives of ‘just, quick and cheap’ resolution of the issues in the proceedings
- Civil Procedure Act 2005 (NSW), s 56(1): ‘The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.’
- Historical context

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- Expensive, long, inaccessible litigation
- UK reforms – focused on proportionality in achieving justice
 - Extent
 - Financial position of parties
 - Severity of case
 - Legislative reforms to Australian jurisdictions