Week 1: Introduction, UCPR and the Adversarial System of Litigation

Civil procedure is concerned with the rules of governing the way in which civil (non-criminal) cases before courts are conducted.

Civil procedure and evidence law:
Both provide 'adjectival' rules, that is rules of process rather than rules about substantive rights and obligations.
Civil procedure concerned with commencing, maintaining and enforcing civil claims. Law of evidence provides the rules and principles which govern the proof of facts in issues at a trial.

Law of civil procedure is found in common law, statute and delegated legislation (court rules).
Focus is on the court rules as applies in the Supreme, District and Magistrate Courts of Queensland. Key source of rules are the Uniform Civil Procedure Rules (UCPR).

UCPR
Is a delegated legislation, made under *Supreme Court of Queensland Act 1991.* It came into effect on 1 July 1999 and it generally applies across the Supreme Court (Trial Division and Court of Appeal), District Court and Magistrates Courts.
UCPR introduced with a number of a number of aims, including:

- Increase access to justice and reduce costs
- Improve relationship between solicitors and their clients
- Give courts better powers to manage cases before them.

Reform in Queensland, expressed through the introduction of the UCPR, part of a trend which has swept the UK and Australia (and before them the US) has occurred because of dissatisfaction with the past manifestations of the traditional adversarial system of litigation.

Adversarial System
The ultimate philosophy of dispute resolution in the UCPR is Adversarialism. In the Western legal tradition there are two approaches to dispute resolution

1. Common Law/Adversarial; and
2. Civil Law/Inquisitorial.

Traditional features of a common law/adversarial system:

- Application of judge-made case law, but note modern reliance on detailed statutory law.
- Inductive legal reasoning.
- **Parties control dispute,** judge relatively passive.
- **Expense falls mostly on parties.**

Features of the civil/inquisitorial system:

- Source of law is code, glossed by legal scholars.
- Role of judiciary is proactive and inquisitive.
- Less formal court-room procedures.

Traditional model of adversarial system assumed the parties' self-interest and sanctions such as adverse cost awards are enough to prevent delay and high costs. However, there is a question whether there assumptions are valid: true costs of litigation (financial, personal) and repeat players vs one-shotters.
Criticisms of adversarialism has led to significant reform of common law jurisdiction procedure. Attempts to supplement party control with court supervision (for some commentators a movement towards an inquisitorial model). In Australia the reform focus has been in greater court control through case management. The UCPR and practice directions reflect this.

Case Management
Case management is a system under which the court actively manages the conduct of cases, from commencement to disposition. It varies between jurisdiction from aggressive control of proceedings (Federal Court) to looser control (Queensland).
Important features of case management:

- Management of litigation not to be left to the parties, instead the court plays an active role.
- Reflects public interest in the efficient functioning of the civil system.
- Use of standards and goals to measure case progress.

Case management systems actively encourage early resolution of disputes, through court-annexed alternative dispute resolution procedures (such as mediation and case appraisal). ADR has probably reduced the volume of matters going to trial.
Systems may vary:

- Matter list – case controlled by court registry and may be assigned to different judges at different stages of the proceeding. Supreme Court of Queensland uses this system, although it also uses elements of docket system.
- Individual list/docket system – case assigned to single judge, who manages that case from filing to disposition. Federal Court has adopted this system.

Ethos of case management reflected in UCPR rule 5:

- 'facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense'; and
- 'objective of avoiding undue delay, expense and technicality'.

Rule 5 elevates this underlying ethos to an implied undertaking from the parties to the court and to each other to proceed as expeditiously as possible.

The Supreme Court of Queensland (Trial Division and Court of Appeal) has taken a robust approach to the application of rule 5: *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175:

- Late amendment of pleadings (3 days before trial scheduled).

- High Court basically said interest in public in resolving dispute means case management override parties freedom. What is just applies to other litigates wanting court not just parties.

However, that was overturned in *Queensland v JL Holdings P/L* (1997) 189 CLR 146.

Apart from rule 5, principles of case management are reflected most notably in Chapter 10 of the UCPR.
Rule 367: Court may make any order or direction about the conduct of a proceeding it considers appropriate. Note: not dependent on application by a party.
Rule 368: A proceeding may be managed by the court consistent with any relevant order, direction or practice direction.

Practice Direction No 17 of 2012
Establishes a system of case management for all civil claims. Explicitly designed to reinforce philosophy of rule 5. It assumes that a matter will be ready for trial 180 days after the filing of the defence. Specific intervention by court (through a notice system) where target times are not complied with. Proceedings resolved by default if party, after notice, cannot specify delay.

Practice Direction No 11 of 2012
Sets out special management procedures for long and/or complex matters: 'Supervised Case List'. Applies to proceedings with estimated trial period of more than five days. It will be allocated a 'supervising judge', who has regular hearing with parties directing the procedure up to and including trial – especially disclosure, joinder parties. Also imposes on parties requirement to be transparent and pre-emptive in their pre-trial preparation.

Week 2: Prior to Proceedings

We are looking at what needs to be considered prior to commencing an action.

Client Care

Should you find yourself working as a litigation solicitor, the nature of your clients and the management skills required will vary according to:

- Large/medium/small firm
- Community/government/corporate sector
- Position within firm/organisation

For example: large commercial firm is sophisticated and well resourced, you have the same clients; large matters with sometimes many lawyers working exclusively on one matter. Small firm is less sophisticated, one-off clients with relatively few resources, one lawyer will be responsible for many files.

Regardless of the firm/organisation, there are some basic tenets of clients which are generally applicable:

- Promote positive and productive interaction between clients and all members of the firm-
- Be available, approachable, interested, understanding of client needs and all members of the firm.
- Mutual expectations should be clear, with transparent complaint resolution procedures in place.
- Clients should be updated regularly, and receive value for money.

Honesty and competence are particularly significant in a litigation context: Any client contemplating litigation needs to understand that litigation is expensive, time consuming and uncertain. Clients need to be provided with a realistic, not optimistic assessment of the advantages and disadvantages of commencing litigation.

Rules about client care may be enforced in contract and/or tort, and are reflected in statute and delegated legislation.
Legal Profession Act 2007 (Qld): Part 3.4 – disclosure clients regarding costs (s 308).

File Management

Basic file management requirements include:

Keeping a paper-trail (or what electronically now amounts to paper trail): everything – instruction, advice, research, memos, record of telephone conversations, and so on…
Important if a client challenges you on a step taken in the action or on costs; dates and bring-up system: paper and electronic, and very important in litigation, where missed court dates, filing times etc. can be very costly for your client;
Working on files of others: Clear instructions from acting solicitor are crucial; can be totally responsible (e.g. acting solicitor on leave) or partially (e.g. preparation of a research memo on a particular issue).
Again, paper-trail is very important; handover of files: Carefully manage with client, clear instructions are important and usual practice is to leave a file note providing background on the matter, current status, and necessary further steps/important dates.

Ethics and the Adversarial System

One of the fundamental elements of professional conduct is the obligation to act ethically. The ethical conduct of lawyers is broadly underpinned by two important sets of duties:

1. Duties to the client
2. Duties to the court

Duties to a client include those of loyalty, confidentiality, competence, and to inform, advise and obey.
These duties underpin the aspects of client care covered earlier.

Duties to the court (or to public administration) include: acting honestly (e.g. not misleading the court or breaching undertakings to the court) and acting fairly (e.g. not pursuing hopeless cases, not making unsupported allegations, not causing unreasonable expense or delay).
Formally, duties to the court take precedence over duties to client.

In an adversarial system, however, duties to clients may seem to overwhelm duties to the court: ethos of 'winning at all costs', commercial pressures, including the need to satisfy the client to ensure repeat business and well-resourced clients able to exploit court processes to obtain their objectives.

Issue of professional conduct arose in ***White Industries (Qld) v Flower & Hart*** (Goldberg J): Counsel said: "I can't really find anything in the file, but I'm sure we can find something to initiate the proceedings." The court said that you can't do that. Solicitors in the proceedings 'knowingly obstructed the course of justice'; counsel advised that arguable, but weak case existed, and not to wait for further evidence, so as to institute proceedings before other side did.

Cause of Action

The phrase 'cause of action' is not a formal legal term. It is a short hand term used by litigators to say that is the litigator's opinion that sufficient evidence exists (or is likely to exist) for all the elements of a substantive area of law to be made out.
Substantive law gives the elements of a cause of action.
E.g. a cause of action for breach of contract needs: a valid contract (offer and acceptance), breach of a term, damage resulting from breach.
You need to show that there was a duty owed, that there was a breach of that duty and that as a result of that breach the damage occurred.

Cause of action links with ethics. It is your professional opinion that sufficient evidence exists (or is likely to exist) to substantiate the causes of action: *White Industries v Flower & Hart.*
Need to plead **all** the elements. For most common law actions this involves the need to plead damage. Most proceedings will involve the joinder of multiple causes of action.

Limitations of Actions

What is limitation period? The period of time within which an action must be brought after a cause of action accrues. Once the cause of action accrues (breach, breach of the duty or damage) you have a certain period of time in which to bring your action, otherwise the client will lose their action to sue forever.
Reasons for having limitations of actions? Certainty for the offending party/defendant– liabilities and to avoid prejudice in defending proceedings. Action brought outside the limitation period means defendant can raise a *complete defence.* If the defendant doesn't raise the end of time defense in the proceedings then it is not applicable. It has to be raised by the defendant to become a defense.

Limitations of Actions Act (Qld)

- Contract – 6 years (s 10) – where there is property damage/no personal injury
- Tort – 6 years (s 10) – no personal injury
    - If there is personal injury involved then it is 3 years (s 11)
- Action on Judgment – 12 years from date judgment becomes enforceable (s 10)
- Series of Conversion/wrongful detention chattel – 6 years from first conversion (s 12)
- Recovery of Land – 12 years from date right of action accrued to plaintiff (s 13)
- Action v Deceased – 12 years from date right to receive share accrued (s 28)
- Beneficiary v Trustee to recover property or breach of trust action – no limit (s 27)
- Equity – doctrine of laches – LAA generally applies to common law proceedings

If you miss the limitation period, you lose your right to sue forever.
There is no set time limits in equity, but there is doctrine, which says that you have to bring action in reasonable time, however there is no set time limit.

Savings Clause

Section 7 LAA is a savings provision acknowledging that time limits do occur in other legislation. E.g. *Civil Aviation (Carrier's Liability) Act (Cth)* s 34 in *Proctor v Jetway Aviation [1982]* 2 NSWLR 264.

Beginning of Limitation Period is from the date the cause of action arises. This means when all the elements of the cause of action are present. I.e. contract – from the time of breach; tort – from the time that damage is sustained.

Expiry of Limitation Period

See section 38 *Acts Interpretation Act 1958* (Qld): If a cause of action accrues on 12 February, 3 years will not expire at the end of 11 February but rather, the end of 12 February. If expired on non-business day, plaintiff has until next business day to file. I.e. if cause of action expired on Sunday can still file on the immediate Monday.

Generally, does not extinguish action, but only bars relief if raised by defendant UCPR r 150(1)(c). This means that defendant must plead LAA!!! Exception – Section 24 LAA provides person's title in land extinguished in action for recovery not brought within limitation period.

Contracting Out

It is possible for parties to agree not to plead limitation period. Correspondence from defendant saying 'liability is not an issue' has been held to amount to contract that precluded defendant from contesting liability, including defence that claim is statute barred. *Newton, Bellamy & Wolfe v SGIO* (1986) 1 QdR 431.

Extensions of Limitations Period

LAA Part 3. Remedial in nature and designed to assist plaintiffs who have not, for some genuine reason, taken action and whose case would otherwise be statute barred, or will become so in the near future. It is not designed to assist sloth, tardiness, laziness …