

1. INTRODUCTION

Civil procedure is the mode of the proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right: *Poyser v Minors* (1881)

- Procedural law governs the conduct of proceedings before the court, it is seen primarily as a **process for the resolution of civil disputes**
- Regulates the ways in which substantive rights and obligations are claimed, proved and enforced

Civil procedure law comes from the Supreme Court (General Civil Procedure) Rules 2015 (Vic):

- Designed to lay out procedures for bring a case to court
- Source: *Supreme Court Act 1986* (Vic)

S25 of Supreme Court Act gives judges the power to make these rules:

- Magistrates Court judges have the power to make the same rules to govern their proceedings (similar to SCR)

The Supreme Court also has inherent jurisdiction to regulate its own proceedings:

- The inherent jurisdiction of the court provides the court with such power as is necessary to ensure that its processes are capable of producing just results
- The purpose of the inherent jurisdiction of the Supreme Court is to allow the courts to regulate its own processes so as to prevent abuse of that process
- E.g. the Supreme Court can make orders to prevent one party from delaying/frustrating/impeding the process of the case going to trial

>Overarching purpose of CPA

S7 CPA(1) the overarching purpose of this Act and the rules of the court in relation to civil proceedings is to **facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute**

(2) Without limiting how the overarching purpose is achieved, it may be achieved by-

- (a)** The determination of the proceeding by the court
- (b)** Agreement between the parties
- (c)** Any appropriate dispute resolution process-
- (i)** Agreed to by the parties; or
- (ii)** Ordered by the court

^Read in conjunction with O1.14 SCR

S8- the court is to give effect to the overarching purpose in the exercise of any of its powers

- A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers...
- Subsection (1) applies despite any other Act (other than the Charter of Human Rights and Responsibilities Act 2006) or law to the contrary.

>How do courts interpret the rules?

SCR O1.14: establishes an overriding philosophy that the court must manage litigation so as to bring cases to an early and economical end, consistently with the needs of justice

(1) In exercising any power under these Rules the Court—

- (a)** shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;
- (b)** may give any direction or impose any term or condition it thinks fit.

>Breach of SCR

Non-compliance with rules generally means no sanction will be imposed on the bad party, except for in circumstances where good party requests.

>Traditional adversarial system in Aus.

A number of features emerge in this system:

- The parties themselves have to define the issues that needed adjudication
- Only when the parties indicated to the court that their case had been prepared did the judges then take a role; the judges only determined (made a determination) on the issues presented to court by the parties themselves
- Judge could only determine the issues that the parties themselves had raised
- Even at the hearing itself, the judge has a passive role to play
- Judge not permitted to ask too many questions of witnesses
- If this is the case, it could be seen that they are entering into the arena of dispute
- Can ask to clarify what witnesses have said, but cannot ask questions to cover gaps in either parties case

Procedure:

1. Responding party has to be notified of the suit and the details (WRIT MUST BE SERVED)
2. Defendant must file a defence
3. Plaintiff serves notice of discovery
4. Parties may serve interrogatories
5. One party may seek the assistance of the court regarding disclosure

Haare v Magistrates Court [2003]:

- In the traditional system, the object of the judge is to find the truth, but that needs to be done in the parameters on the issues before the court. Judge plays a non-interventionist role
- According to the traditional system, civil procedure was prevised on party control, judges played a merely passive role; in that they did not interfere or intervene in the preparation or presentation of a case. Notwithstanding order 1 rule 14.

Jones v National Board (1957):

The court had no role to play in what issues the parties had to bring to the court; also, no role in the evidence to bring; the judges role is PURELY passive

Fookes v Slaytor (1979):

- Driving car on wet night, smashed into a parked truck and suffered injuries, P sued owner of parked truck, D didn't bother to file a defence + didn't bother to attend the hearing.
- At the hearing trial judge gave judgement to P but reduced the amount P got due to contributory negligence, P appealed and they held that trial judge was NOT allowed to reduce the damages, while obvious P contributed to situation
- Appeal held that P was entitled to full amount as D didn't raise the defence of CN (it was never an issue before the court) The Judge can only find the truth on the issues before the court

>Case management

- The judge will set a timetable by which certain interlocutory steps have to be taken, thus delay is brought under control by the court setting and enforcing a timetable for the progress of cases
- **Courts have a responsibility to prevent waste of time and public money**
- Traditionally courts will grant adjournments to allow parties to amend their documents, this is so those cases can be fully presented;

adj. granted where there is no bias or prejudice to the other party

- Issue: if party seeks adjournment, does court say no because they are trying to strictly enforce case management guidelines. OR does the court do justice, by granting adj. when requested?
- Are we depriving the party the right to present their argument fully?

Sali v SPC Ltd. (1993) HCA:

Held in favour of case management:

- Don't only consider justice before parties before us, in granting adj.'s they affect other parties waiting to have their hearing
- Case management principles essentially come first; must consider interests of all other litigants awaiting their trial

Queensland v JR Holdings Ltd:

- Justice is paramount consideration in determining an adjournment
- Case management is a relevant consideration, but should not prevail over injustice of shutting someone out from presenting their case fully

AON Risk Services v ANU (2009):

- Rules not only to be considering the outcome of the dispute; broader considerations to be taken into account:
- For other litigants awaiting trial, not just parties at hand.
- This position has since been embodied in Civil Procedure Act

>Directions hearing

Lays down the time frame that the parties must follow, sometimes a party will want to induce new documents, while under case management principles, there is control over adjournments and compliance with timetables, judges will hear this on a case-by-case basis as it all will depend on the interests of justice.

S47 CPA: Judicial powers of case management-overarching purpose and active case management

- (1) Without limiting any other power of a court, for the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the court may give any direction or make any order it considers appropriate, including any directions given or orders made—(a) in the interests of the administration of justice; or (b) in the public interest.

- (2) A direction given or an order made under subsection (1) may include, but is not limited to, imposing any reasonable limits, restrictions or conditions in respect of—(a) the management and conduct of any aspect of a civil proceeding; or (b) the conduct of any party.
- (3) Without limiting subsection (1) or (2), a court may actively case manage civil proceedings by—(a) giving directions to ensure that the civil proceeding is conducted promptly and efficiently; (b) identifying at an early stage the issues involved in the civil proceeding, including any issues that have not been resolved in accordance with any mandatory or voluntary pre-litigation processes; (c) deciding the order in which the issues in dispute in the civil proceeding are to be resolved (d) encouraging the parties (e) controlling the progress of the civil proceeding (f) limiting the time for the hearing or any other part of a civil proceeding (g) considering whether the likely benefits of taking a particular step in a civil proceeding justify the cost of taking it.

2. VIC. COURT HIERARCHY:

Before Supreme court can hear a case, must have jurisdiction to hear that case (jurisdiction means the power of the court to hear a case)

Supreme court must have 2 concurrent powers:

- Subject matter jurisdiction
 - Territorial power (in personam) jurisdiction
- S85 (1) Victorian Constitution Act 1975:**
- provides for the jurisdiction of the supreme court, it should have jurisdiction in all cases whatsoever with unlimited jurisdiction
 - Jurisdiction can be curtailed by specific legislation
 - Can hear cases about any matter

>Territorial Jurisdiction

Courts must have jurisdiction over the Defendant, as well as subject matter jurisdiction (in personam)

- Means at CL: the power of S court to hear a case against a defendant depends on this fact, at the time D is served with the writ D had to be within the state of Victoria

Laurie v Carroll (1958):

- HCA: power of s court depends on amenability of the D to the writ
- CL position is that the writ does not run beyond the limits of the state

- D must be amenable or answerable to the command of the writ; this depends on presence of the D within the jurisdiction
- Service of writ is absolutely essential as a foundation of the court's jurisdiction, if cannot be legally served on D, the court has no jurisdiction over him/her
- **Whenever it can be served legally, the court upon effectuation of service has jurisdiction or power to hear a case against that D.**
- Presence within jurisdiction, not when writ is filed in court, but when service is attempted
- Presence at time of service is necessary as distinct from when it is filed in court
- **Even if the D is temporarily within Victoria, and is served during that temporary presence, the Supreme court will acquire the necessary jurisdiction**
- *If a D is fraudulently enticed into Victoria and then served with the writ, the S court would not have jurisdiction*

>Cross Vesting Legislation

Cth parliament and state parliaments introduced legislation called **Jurisdictions of Courts (Cross-Vesting) Acts (1987):**

- Point of this legislation was to avoid uncertainty, expense and delay that existed prior to the passing of this legislation

This act introduced 2 broad aims-

1. **It conferred on each court the jurisdiction of the other courts (i.e. S court of a state had federal jurisdiction and vice versa) each of the courts had jurisdiction to hear cases which rightly belong to the other courts**
 - a. Applies to all Australian courts, federal and state, other than Magistrates and County Courts.
 - b. **Re Wakim (1999):** HCA declared that a federal court could not be vested with state jurisdiction (as under Cross-Vesting Act) as it is constitutionally invalid, all other pieces of that legislation were declared valid
 - c. State courts could apply federal jurisdiction but federal courts cannot exercise state jurisdiction
2. **The act gave the power to the courts to transfer cases to a more appropriate court in the interest of justice**
 - a. Must have mechanism in legislation where a court could transfer a case to a more