

Introduction to Civil Procedure in NSW; Guiding Principles; Case Management and the Overriding Purpose

Three key themes:

1. The overriding purpose of the civil procedure Act 2005 (NSW) section 56
2. The impact technology is having on legal practice
3. A lawyer's duty to the court may conflict with our duty to the client

What is procedural law?

- '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;
McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 at 26- 27 per Mason CJ" – Kumar, Legg & Vickovich, Civil Procedure in New South Wales (Lawbook Co, 2016), 3.
- Sometimes described as 'adjectival' law – distinguishes it from 'substantive law.'
- See Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170 at 176-7.

Purposes of procedural law

- It provides the institutions and rules which **facilitate dispute resolution**.
- Relatedly, procedural law is an important component of the idea of **the rule of law**
- By providing an open and transparent method by which parties can assert their rights, it encourages people to recognise the authority of the legal system and submit themselves to it E.g. through CPA and UCPR
- The court interprets these rules and through their interpretation, they communicate to litigants the type of behaviour they expect and the types of cases they are willing to listen to
- Modern procedural law has an important role in managing the **flow and conduct of litigants** – it has practical economic and bureaucratic functions which are very important in a litigious age where the costs of court action is ever- increasing.

Types of legal systems:

1. Adversarial
2. Inquisitorial

Adversarial system

- Origins in the English common law.

Key features:

- A reactive, impartial judge who acts as an umpire
- Party controlled dispute (that is the parties define the dispute and present evidence and argument);
- the use of precedent, procedural rules and laws of evidence
- Determining legal disputes according to their individual circumstances and related judge- drawing upon case law and legislation;
- An inductive form of legal reasoning;
- The trial is the distinct and separate climax to the litigation process;
- Court-room practice subject to rigid rules;
- Emphasis on oral arguments – judiciary largely reactive;

Inquisitorial system

- Origins in revolutionary France and Roman legal tradition.

Key features:

- Judge's role is both proactive and inquisitive
- Source of law found in authoritative statements of legal principles issued by the state e.g. Civil and Criminal Codes;
- A deductive form of reasoning;
- No rigid separation between pre-trial and trial processes;
- Procedural rules are meant to be minimal and uncomplicated; and
- Lawyers are not as central to the court hearing and litigation process – emphasis is on written submissions. The judiciary is proactive and inquisitorial.

Sources of procedural law in NSW

Three sources of procedural law, divided between each arm of the government:

1. The legislature

- Responsible of creating legislation that governs all activity of the state
- *Supreme Court Act 1970 (NSW)*: Establishes the supreme court, administration and statutory powers
- *Civil Procedure Act 2005 (NSW)*: regulates civil procedure in NSW (only covers state courts not federal). Contains the rules about the process of litigation e.g. costs, handling matters, amending documents, vests the court with the responsibility of case management

2. The executive:

- *Uniform Civil Procedure Rules 2005 (main element)*: made pursuant to the CPA. Created for consistency and comprehensibility

- Rules are important for civil proceedings (covers matters from commencing to enforcing). Not a code and complement the inherent jurisdiction of the court.
- 3. **The judiciary:**
 - Creation of procedural law through interpretation of the operation of CPA and UCPR
 - The courts develop their own forms of procedural law through the inherent jurisdiction of superior courts (NOT lower courts)c, enshrined in court practice notes, and judicial decisions
 - Allow courts to control their own processes
 - Provides superior courts (supreme) the power to ensure their procedures are capable of producing just outcomes (to control abuse of process)

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.
- Examples of devices originally derived from Court's inherent jurisdiction:
 - Security for costs orders
 - Asset preservation orders
 - Search and seizure orders

The overriding purpose

Every rule must be read in light of/ subject to section 56 ('just, quick, and cheap')

s 56(1) of the CPA:

'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: expensive, long, inaccessible litigation (*Woolf Report [1995]*);
- *Lord Woolf* stated that a successful civil justice system should do three things:
 - 1) Should be **understandable** to those who use it
 - 2) Offer appropriate procedures at **reasonable costs**
 - 3) Deal with cases at a **reasonable speed**
- Subsequent to the report came the UK reform by developing a new set of civil procedure rule and this new structure included an **over-riding purpose** which focused on **proportionality in achieving justice and involved weighing up the expense and the significance of cases including the complexity of the issues, and the financial position of the parties**
- This represented a different modality to the historical approach
- *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, 965 [54] (CCA): "It is no longer the role of the court simply to provide a level playing field and to referee whatever the parties choose to play, the court is concerned to ensure that judicial and court resources

are appropriately and proportionately used in accordance with the requirements of justice”

- Following UK, legislative reforms to Australian jurisdictions implementing the over-riding purposes

s 56 of the CPA – what the overriding purpose entails

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3):

- (a)** any solicitor or barrister representing the party in the proceedings,
- (b)** any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

The object of the overriding purpose

- **Section 56** is wholly relevant to the process which the dispute will be resolved e.g. the procedure decisions of the judges, the conduct of the judges/ parties/ lawyers along the way.
- The overriding purpose of the CPA is **not** about the court’s final decision on the substantive rights and interests in the legal dispute e.g. you can’t invoke the overriding purpose to determine if someone actually breached a contract, committed a tort etc.

Objects of case management:

s 57 CPA

(1) For the purpose of furthering the overriding purpose referred to in section 56 (1), proceedings in any court are to be managed having regard to the following objects:

- (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.

(2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

Dictates of justice:

s 58 CPA

Court must seek **to act with the dictates of justice** in deciding whether to make any **order or direction for the management of proceedings: s 58(1) CPA**

- Re 'dictates of justice' in a particular case, the court must have **regard to ss 56 and 57**, and may have regard to:
 - (i) the degree of difficulty or complexity of issues in proceedings,
 - (ii) expedition of parties throughout proceedings,
 - (iii) degree to which any lack of expedition is due to circumstances beyond the control of the parties,
 - (iv) degree to which parties have fulfilled their duties under section 56 (3),
 - (v) parties taking procedural opportunities,
 - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
 - (vii) other matters as the court considers relevant in the circumstances of the case.: **s 58(2) CPA**

Other:

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.

Framework relevant to all procedural decisions:

