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## ***Week 7: Civil Procedure Themes***

### **1. Main idea**

- 1.1 Criminal procedure:
  - 1.1.1 State vs defendant;
  - 1.1.2 State more powerful;
  - 1.1.3 Outcome is usually punishment;
  - 1.1.4 Police and courts have major role in enforcement;
  - 1.1.5 Higher profile in media;
  - 1.1.6 Small body of underlying substantive law applies;
  - 1.1.7 State bears most costs.
- 1.2 Civil procedure:
  - 1.2.1 Private vs private (including Gov);
  - 1.2.2 Party power can be uneven;
  - 1.2.3 Many possible outcomes, usually involving money;
  - 1.2.4 Courts and individuals enforce (+bailiffs, sheriffs);
  - 1.2.5 More common and affects more people;
  - 1.2.6 Huge body of underlying substantive law applies;
  - 1.2.7 Individuals bear most costs.
- 1.3 Key themes in civil procedure:
  - 1.3.1 Open justice;
  - 1.3.2 Procedural fairness;
  - 1.3.3 Adversarial vs inquisitorial system;
  - 1.3.4 Access to justice;
  - 1.3.5 Efficiency vs the right to be heard.
- 1.4 Adversarial system (Aus):
  - 1.4.1 Parties control dispute – parties define dispute and present evidence and argument;
  - 1.4.2 Court decision from precedent, binding on future decision;
  - 1.4.3 Trials are lengthy and involve extensive evidence;
  - 1.4.4 Judge as umpire – impartial; role is reactive;
  - 1.4.5 Emphasis on oral argument/evidence especially cross-examination;
  - 1.4.6 Parties bear the costs.
- 1.5 Inquisitorial system:
  - 1.5.1 Mainly codified law – prior cases are merely persuasive;
  - 1.5.2 No rigid separation between trial and pre-trial phases;
  - 1.5.3 Minimum rules of court-room practice;
  - 1.5.4 The judge's role is proactive and inquisitive;

- 1.5.5 Strong emphasis on documentary proof;
- 1.5.6 Virtually no cross-examination and often no physical hearing (ie. entire matter heard 'on the papers');
- 1.5.7 Cases are generally much shorter.
- 1.6 Civil procedure can be defined as "rules which are directed to governing or regulating the mode of conduct of court proceedings": *McKain v R W Miller & Co (SA)* (1991) Mason CJ [26-7]. It teaches us how society resolves disputes between private parties (both with and without court) and the role lawyers play in that process.
- 1.7 Primary sources of civil procedure law:
  - 1.7.1 *Civil Procedure Act 2005* (NSW) [CPA];
  - 1.7.2 *Uniform Civil Procedure Rules 2005* (NSW) [UCPR];
  - 1.7.3 *Federal Court Rules 2011* (Cth);
  - 1.7.4 *Federal Court of Australia Act 1976* (Cth).
- 1.8 Problems with civil procedure:
  - 1.8.1 Cost;
  - 1.8.2 Delay;
  - 1.8.3 Lack of access (usually due to cost and delay);
  - 1.8.4 Uncertainty;
  - 1.8.5 Unfairness;
  - 1.8.6 Excessive complexity.
- 1.9 Civil procedure is about balancing competitive objectives. Some key areas where objectives clash are:
  - 1.9.1 The tension between efficiency (cost and delay reduction) and justice/procedural fairness – *AON v ANU*, *Queensland v JL Holdings* and *ERA v Armstrong*.
    - 1.9.1.1 It takes time and money to explore evidence so increases in efficiency can threaten justice.
  - 1.9.2 Access to justice and the role of litigation in society.
    - 1.9.2.1 Does society benefit more from careful but expensive justice which sets good precedents for society to follow or from quick and cheap justice which is accessible to everyone?
  - 1.9.3 Open justice vs the right to privacy.
    - 1.9.3.1 Open justice is key for judicial accountability and faith in our justice system but it is also a significant invasion of privacy and can involve vulnerable parties such as children and the disabled – ie. *Rinehart v Rinehart* [2014].
    - 1.9.3.2 Spigelman CJ in *John Fairfax Publications v District Court of NSW* (2004): 'open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public...is an essential quality of an Australia court of justice.'
    - 1.9.3.3 Justice can be closed by: closed court orders (family law); non-publication orders (defamation); pseudonym orders (migration/children); orders for anonymous witnesses (eg. use of screens, CCTV, pseudonym orders (*Witness v Marsden* (2000))); confidentiality of documents (*NAK v Starkey* and *Seven Network (Operations) v James Warburton* (No 1)).
    - 1.9.3.4 Brereton J in *NAK v Starkey* [2008]: "discovery

constitutes a serious invasion of the privacy and confidentiality of a litigant's affairs and, while the process forms part of civil procedure because of the public interest in ensuring that justice is done between the parties, it ought not be allowed to place upon the litigant any harsher or more oppressive burden than is required to permit justice to be done".

- 1.9.3.5 *Rinehart v Rinehart* [2014] set out principles of open justice:
  - 1.9.3.5.1 Suppression order must be "necessary" to prevent prejudice to administration of justice;
  - 1.9.3.5.2 Open justice fundamental principle of justice system;
  - 1.9.3.5.3 Court must consider primary objective is to safeguard public interest in open justice (suppression order legislation supports this - s 65 *Court Suppression and Non-Publication Orders Act 2010*);
  - 1.9.3.5.4 Need to do justice as part of "necessity" principle;
  - 1.9.3.5.5 Media reporting is corollary of "open justice";
  - 1.9.3.5.6 Possible embarrassment, loss of reputation, consequential loss is generally price parties must pay to litigate;
  - 1.9.3.5.7 Recognised exceptions include where openness would destroy justice by vindicating blackmailer or seriously affect commercial value of subject matter.
- 1.9.3.6 S 71 *CPA* is a statutory power that departs from open justice.
- 1.9.3.7 *Court Suppression and Non-Publication Orders Act 2010* empowers courts to make a suppression or non-publication order. Is in addition to inherent power. SS 7 and 8 set out the powers to grant orders.
- 1.9.4 The role of judicial discretion in managing cases.
  - 1.9.4.1 Too much judicial discretion leads to uncertainty for litigants and reduced justiciable accountability but rigid rules of procedure do not cater for the variety of litigants and their needs.
- 1.10 Justice delayed is justice denied (ie. delay and cost prevent justice) so efficiency is crucial to justice **vs** the right to procedural fairness: *audi alteram partem* (hear the other side).
- 1.11 S 56 *CPA* provides the overriding purpose of this Act.
- 1.12 The best procedure is the fastest and cheapest but this risks substantive justice. The closest thing to the 'right answer' (substantive justice) may be procedurally unfair as it is likely to be expensive and slow. If process takes too long it becomes procedurally unjust and substantively unjust (eg. dead witnesses, parties giving up).
- 1.13 *NAB v McCann* [2010]: slide 13.