TOPIC 1:
OVERRIDING PURPOSE + CASE MANAGEMENT

PROCEDURAL LAW

- ‘Rules governing or regulating the mode or conduct of court proceedings’ (McKain v RW Miller - Murphy)
- ‘proceedings enforcing legal right, distinguished from law which defines right’ (Poyser v Minors - Lush)
- Described as ‘adjectival law’ – method of accessing and enforcing substantive rights

PURPOSE

- Provides institutions and rules which facilitate dispute resolution
- Structure, order and consistency for how judges make decisions
- Component of Rule of Law – ‘fair, economical and expeditious’ (Jolowicz)
- Access to justice: managing flow and conduct of litigants
- Economic and bureaucratic functions – cost of court is forever increasing

SOURCES

- Legislature: Supreme Court Act 1970 (NSW) + Civil Procedure Act 2005 (NSW)
- Executive: Uniform Civil Procedure Rules 2005 – pursuant to CPA
- Judiciary: court develops own form of procedural law – through practice notes, superior courts + decisions

INHERENT JURISDICTION

- “allows court to properly exercise their powers, perform functions and control abuse of process” (Riley McKay v McKay)
- Examples – security for costs orders, asset preservation orders, search + seize orders

OVERRIDING PURPOSE s 56(1) CPA

- “to facilitate the Just, quick and cheap resolution of issues in proceedings”
  - (2): when the court exercises procedural power, it must always seek to give effect to the overriding purpose
  - (3): duty of party to facilitate overriding purpose and comply with directions and orders of the court
  - (4): solicitor, barrister or any relevant person must not breach duty
  - (5): failure to comply with overriding purpose – costs may be awarded against party

APPLICATION:

- ‘promote speedy disposition of proceedings so that citizens can obtain prompt resolutions’
  - Matters must be steadily borne in mind at all times (Hans Per Constructions)

TENSION:

- between speed, including avoiding delay, reduction of costs and just consideration in resolving matters, especially ones of complexity (Halpin v Lumely)

CASE MANAGEMENT

- s 57 CPA
  - (a) just determination of proceedings
  - (b) efficient disposal of litigation
  - (c) efficient use of available judicial and administrative resources
  - (d) timely disposal of proceedings at a cost affordable manner by the respective parties

OVERVIEW

- approach of courts supervising, progressing + controlling through its interlocutory phase (Colbran et all)
- UCPR r 2.1: court may make directions + orders for the just, quick and cheap disposal of proceedings
  - r 2.3 – examples: creation of timetables, filing of written submissions etc.
- Shift from ‘adversarial’ judging to ‘managerial’ judging (JL Holdings - Kirby)

CASES:
Sail: court looks beyond interest of parties + court resources.
- Considered effect case will have on awaiting cases + how it may affect public interest

JL Holdings: justice was paramount consideration. Principles of CM cannot supplant attainment of justice

AON: (overturned JL Holdings)
- Speed + efficiency (minimum delay + expense) are essential to just resolution.
- Considers nature + importance of amendment, stage when amendment was sought + explanation

**Dictates of Justice**
- **S 58(1) CPA:** seek to act with dictates of justice in deciding whether to make any order or direction
- **S 58(2) CPA:** Re ‘dictates of justice’
  - (i) 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 party
  - (iv) Degree to which parties have fulfilled duties under s 56(3)
  - (v) Parties taking procedural opportunities
  - (vi) Degree of injustices suffered by the parties as a consequence of any order or direction
  - (vii) Other matter as the court considers relevant in circumstances of the case

**Costs + Sanctions:**
- Express power to make cost orders where costs have been incurred ‘improperly, or without reasonable cause’
  - Including non-compliance obligation imposed on legal practitioners under s 56(4)
- **S 61(3)(f)** Cost orders against party that fails to comply with court directions facilitating overriding purpose
- **S 99(1)** cost orders against solicitor responsible for costs - incurred by their negligence or without reasonable cause
TOPIC 2: ACCESS TO JUSTICE, OPEN JUSTICE, PRE-LITIGATION + CLIENT CARE

OPEN JUSTICE

- Open court principle – court proceedings should be subject to public + professional scrutiny. Component of Rule of Law
- Element of justice - “there is no inherent power of the court to exclude the public” (John Fairfax Publications 2004)
- “publicity of proceedings is protection against arbitrary power + reassurance that justice is administered fairly + properly” (R v Richards + Bijkerk)

EXCEPTIONS
- departing from open justice must be ‘necessary to secure proper administration of justice (Fairfax v Police)
- s 71 CPA: court can be closed to public if:
  - presence of public would defer the ends of justice
  - business concerns the guardianship/custody or maintenance of minors
  - hearing of interlocutory order
- s 8 Court Suppression and Non-Publication Orders Act 2010:
  - prevent prejudice to the proper administration of justice
  - prevent prejudice to the interest of Cth or state in relation to national security
  - protect safety of any person
  - avoid causing undue distress or embarrassment to party/witness involving sexual offences

ACCESS TO JUSTICE

- AG Report: Strategic Framework for Access to Justice in the Federal Civil Justice System:
  - equal access to legal services (eg. lawyers, legal aid and courts)
  - Correcting structural inequalities
- eg. demystifying procedures through plain language, changing court procedures – less traumatic
  - emphasis on informal justice – greater use of ADR
  - lowering cost + improving allocation of judicial resources through competition policy
- Barriers to justice → Low SES, unfamiliarity of the law, location + culture.
- ALRC Report 1999:
  - Access to justice is never going to be perfectly realised in practice
  - Not synonymous with obtaining favourable outcome
  - Means more than physical access to court
  - Importance of case management in triaging disputes – limited court resources + time
- NSW Inquiry
  - 1 in 4 experience substantial legal problem - 85% are civil issues
  - 3% problems end up in court or tribunal - proves litigation is generally last resort
  - 38% take some action, but don’t take it any further (20% take no action – stressful/expensive/don’t know how)

RULES OF LEGAL PRACTITIONERS
- S 56(3)-(5) CPA – party owes duty to further O.P, lawyers/barristers must not put party in breach
  - Breach = cost order.
- Lawyers liable for costs if they commence/continue proceedings without reasonable prospect of success
  - (s 62, Sch 2 - Legal Professional Uniform Rule Application)
- Solicitors Conduct Rules 2015
  - R 4.1.1 must act in best interest of client
  - R 4.1.2 honest + courteous in all dealings
  - R 4.1.3 deliver services competently, diligently + promptly as possible
  - R 4.1.4 avoid compromise to integrity + professional independence
  - R 4.1.5 comply with rules + law
  - R 7.1 provide clear and timely advice
  - R 3.1 “duty to court and administration of justice is paramount - prevails over other duty”
- Barristers Conduct Rules 2015
  - r 35: promote + protect client’s best interest, fearlessly by all lawful means to the best of their skill + diligence
  - r 36: inform client or instructing solicitor about alternatives → ADR
  - r 37: seek to assist client to understand the case issues and their rights and obligations
  - r 38: advise client about advantageous rules or laws if they plead ‘guilty’ → plea deal etc.
  - r 23: “overriding duty to act with independence in the interest of the administration of justice”

PRE-LITIGATION
- 1. Exploring alternatives to litigations → ADR
  - Notify other party of issues in dispute + offer to discuss resolving dispute
  - Respond to any such notification from other side
  - Provide relevant information and documentation to other party
  - Meet up and explore if ADR is appropriate
- 2. Narrow the issue in dispute before commencing proceedings
  - Rules of pleadings require appropriate precision and coherency
  - If pleadings don’t do this - struck out under UCPR → proceedings as whole can be summarily dismissed

CLIENT CARE
- STRATEGIES:
  - Focus on client requirements - not just the legal product
  - Understand what the client needs + wants
• Manage expectations → realistic strength of their case + likelihood of various outcomes
• Communication - Keep client involved and in control

**BENEFITS**
• Lowers barriers to accessing justice – innate social good
• Fewer claims and complaints
• Increased client retention + referrals (positive reputation)
• Potential for higher rates/fees

**TOPIC 3:**
**ALTERNATIVE DISPUTE RESOLUTION, JURISDICTION + LIMITATION PERIODS**

**ALTERNATIVE DISPUTE RESOLUTION (ADR)**
• Non-court process involving impartial person assisting parties to resolve disputes between them (ADR Advisory Council)
• Effective + efficient resolution/limit of disputes, provides fairness in procedure + achieves public/party desired outcome
  o Litigation is last resort → requirement for parties to take reasonable steps to resolve dispute before
  o Risk management tool to settle disputes without litigation or publicity
  o Case management tool to reduce workload of court
  o Leaves possibility for reconciliation (especially in commercial and family contexts)
• BENEFITS
  o Faster, cheaper + still a guided process
  o Less adversarial → less me vs you, emphasis on long-term relationship
  o More flexible – more options on the table as parties coming to their own solution
• DISADVANTAGES (NSW Law Reform Commission Consultation Paper No. 16)
  o If unsuccessful - Longer, costlier + more stressful
  o Cynical parties can use it to draw out disputes
  o Bad faith participation + power imbalances can disadvantage vulnerable participants
  o Could delay needed change → not allowing legal issues to be addressed in court
• TYPES OF ADR
  o Facilitative → leads + assists parties through process **does not** make judgements
    ▪ Mediation, Conciliation, Ombudsman
  o Determinative → provides an outcome that becomes binding
    ▪ Arbitration, Adjudication, Expert Determination
  o Advisory → looks at case law – assesses pros and cons of arguments. Assists in showing unrealistic visions
    ▪ Early neutral evaluation
• ROLE OF LAWYERS
  o S 56(4) CPA + 7.2 Solicitors Conduct Rules → obligation to inform client of ADR
  o Obligation to use ADR as precondition to litigation
    ▪ Structuring, attend + participate in dispute resolution processes
    ▪ Advise and prepare all information for disputes, legal agreements + provisions
    ▪ Explaining rules and limitations of confidentiality in ADR process
• LEGAL PATHWAY TO ADR
  o Timing: Parties voluntarily engage in ADR → court-ordered ADR
  o Subject-specific legislation (NSWLRC CP 16, Appendix A)
  o Government complaints process
  o Contractually required
  o CPA + UCPR (Court Ordered ADR)
    ▪ S 26(1) – if court considers appropriate, may order ADR with or without the consent of the parties
    ▪ S 38(1) – court may order that proceedings before it:
      • (a) regarding claim for the recovery of damages or other money
      • (B) regarding claim for equitable or relief ancillary to claim for recovery of damages/money
        o ...Be referred for determination by an arbitrator
    ▪ R 20.14 UCPR: at any point court may orders for referee, to referee the whole or part of proceedings

MEDIATION
• Part 4, S 25 CPA – ‘structured negotiation process, in which a neutral + independent mediator, assists to resolve dispute’
  o Mediator cannot affect judgement or come up with ideas for solution
• S 26(1) CPA + R 20.6(1) UCPR court can refer any proceedings without consent of parties
• Elements court considers before referring. (Higgins v Higgins)
- Prospect of success – complexity of factual + legal issues - opposition from one or both parties?
- Whether or not there have been previous attempts at settlement
- Court resources and resource implications for the parties
- Public interest consideration + capacity and needs of parties.

- **Part 4, S 34(a) CPA** – doesn’t prevent “parties from agreeing to + arranging mediation of any matter”

- **FEATURES**
  - R 20.6(2) can be done by telephone, video link or other form of communication