

## CIVIL PRACTICE – LIGHTENING TALK TOPICS

### THEMES OF THE COURSE

1. **The overriding purpose of the Civil Procedure Act 2005 (NSW) s 56**
  2. **The impact that technology is having on legal practice**
  3. **Sometimes a lawyer's duty to the court may conflict with their duty to the client**
- The Civil Procedure Act we enacted due to the need for courts to reassert control over the litigation process, in the interests of a due administration of justice, conscious of access to justice, costs and efficiency issues. There was a need for courts to reassert control over the conduct of civil litigation, as well healed or determined litigants could, and did, derail proceedings.
  - As Justice Geoff Lindsay states, the single most important feature of the civil procedure reforms of 2005 was the elevation of the concept of purpose, by the enactment of s 56.
  - The legislative statement of an overriding purpose provides a constant challenge to all participants in civil proceedings, to test what is done, or not done, against the perennial questions: *why* do this? *How* can we do this better?
  - The lawyer's role in civil litigation, especially under a regime of case management, is about managing expectations in a variety of approaches to problem solving.

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- Section 56 CPA dictates that today's courts are not only bound to deliver justice that is impartial and discharged with due process, but they must also deliver justice efficiently and in a way that mitigates rising legal costs.
- Protracted litigation has adverse impacts on both the parties to the dispute, as well as the entire community, by unduly burdening court resources.
- CPA mirrors the desire for justice to be achieved through efficient and cheap procedures.

### CASE MANAGEMENT

- The growing role of case management very much evolved parallel to the introduction of the CPA, and its overriding purpose: to affect the just, quick and cheap resolution of civil disputes in NSW (s 56 CPA).
- The introduction of the CPA, and the adaption of case management were both driven by the need to eliminate extreme delays in the NSW civil justice system.

### **Kumar, Legg & Vickovich 2016: *Civil Procedure in NSW Third Edition***

- Case management arose as a response to the twin evils of delay and excessive costs that could arise from leaving the control of litigation in the hands of the parties without judicial supervision.
- The UCPR and CPA make very clear that the traditional version of the adversary system, where the court had virtually no part to play until the parties indicated that the case was prepared and ready for trial, no longer applies to civil litigation in NSW.
- 'In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone': *Aon Risk Services Australia Ltd v Australian National University 2009*
- Prior to the introduction of case management, cases took up to 2 years before they came to hearing or trial in the NSW courts. Delay had unfortunately become the cultural norm and this needed to change.
- 'Delay will almost always impede the proper disposition of any case that does not come to trial promptly. Memories fade; records may be lost... Delay in a case will almost always add to the costs... Delay in a case also adds to the overall burden on the judicial system': *Gummow and Hayne JJ Jackamara v Krakouer 1998*
- 'The reforms that have taken place under the CPA and the evident attempt by the courts to ensure efficiency can be seen not merely to reflect worthy efforts for efficiency but also to be steps vital for the provision of timely individual justice': *Allsop J Bi v Mourad 2010*
- 'Section 56 purports to identify a single overriding purpose, but it is self-evident that what will be required in most cases is the resolution of a tension between speed, reduction of costs and the proper consideration for the issues raised by the parties, especially in cases of complexity': *Justice Basten Halpin v Lumley General Insurance Ltd 2009*
- Many people have highlighted the tension which in fact exists when trying to reconcile the goal of minimising cost and delay with the principle of a fair trial in the Australian civil justice system: see *Legg 2014, Civil Justice Quarterly 157*
- There is therefore a significant tension which exists for lawyers, as their duty to the court, in helping to affect the overriding purpose may in fact conflict with their duty to their client, in helping to achieve the most advantageous and just outcome.
- The use of technology, in particular electronic case management holds great promise for reducing cost and delay. There are many electronic innovations: e.g. online lodgement of documentation, e-service of documents e-callosers, 24/7 access to services, are anticipated to have a significant impact on how the legal service industry operates. And hopefully, will work toward helping to affect the overriding purpose.

## ACCESS TO JUSTICE

**Barriers accessing justice may include:** language barriers, geographical location, economic disadvantage, social isolation or abuse. In addition to these categories, Aboriginal and Torres Strait Islander people also face more unique difficulties accessing civil justice.

- The introduction of the CPA, and the use of Alternative Dispute Resolution processes works to address some of these issues. ADR works to divert people from civil litigation into alternative methods of dispute resolution.
- These alternative methods are more cost effective, are designed to be navigated by a self-represented litigant, deliver more favourable and flexible outcomes, and can be less intimidating or jarring for people who have not experienced or do not understand the court system and its strict procedures.
- The overriding purpose, of the just, quick and cheap resolution of civil disputes helps a greater number of people access our justice system. Litigation and the courts are no longer as elitist, and case management strategies and a greater access to resources prior to the litigation process can aid people to self-represent.
- The growing use of technology also offers promising results for those who are physically excluded from the justice system, or face geographical barriers in accessing justice.
- For example, the growing use of AVL and electronic methods of filing can be used to enhance flexible service delivery, and improve access to legal services for those people in remote locations.

## OPEN JUSTICE

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- 'The principle of 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 Australian court of justice. There is no inherent power of the court to exclude the public': *John Fairfax Publications Pty Ltd v District Court of NSW 2004*
- Publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially: *R v Richards & Bijkerk 1999*
- "Justice must not only be done but be seen to be done": *Lord Hewett*
- It is only in wholly exceptional circumstances where the presence of the public or public knowledge of the proceedings is likely to defeat the paramount duty of the courts, that the courts may proceed closed.
- The reason for the principle of open justice is that, if the proceedings of courts are fully exposed to public and professional scrutiny and criticism, and interested observers are