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**Example (non-sequential) notes below**

## Traditional Adversarial Mode of Litigation

Seen as a system with two 'planks', the parties and the court

The parties prepared and presented the case whilst the court's function was simply to resolve the issues presented before it

### Features:

1. The parties had to define the issues they sought a decision in
2. The parties themselves prepared and determined the timeline for conducting a trial, the court played no role in pre-trial preparation
3. Judge played a passive role during trial, could not enter into the arena of dispute, thought to prevent accusations of bias (non-interventionist)
  - Role of the judge was to sit, hear and determine the case, doing justice according to the law. Role was to find truth on the issues before the court and not ask too many questions: [Jones v National Coal Board](#)
  - [Fookes v Slaton](#): Judge found contributory negligence even though D did not attend court, issue wasn't raised and P won appeal. Judge constrained by the parameters of the adversarial system
  - [Hoare Bros v Magistrates Court](#): Successfully sought order prohibiting further questions from bench and new judge on basis of apprehended bias by asking questions
4. Court can't impose sanctions for non-compliance with rules unless requested by non-delinquent party
5. Judge cannot adjourn proceedings and ask for further investigation of claims

### Weaknesses

- Long delays before trial as parties were responsible for preparation
- Sanctions only imposed if sought after
- Cost of litigation was often excessive such that it was out of reach for ordinary people (very restricted access to justice)

Concern that the purpose of 1999 was not being met as there was too much power to the parties to do what they like, when they like.

### Case Management

- Approach adopted in 90s to control of litigation in which the court supervises and controls the process of a case pre-trial
- After service of writ parties have to attend a hearing in which a timetable for particular steps is imposed
- Judge is involved from the beginning and ensures that delays are minimised by enforcing a timetable
- Considerations for adjournments (Case Management v Justice)

- Court now considers all parties awaiting hearing in addition to the parties in dispute, the effect of adjournment on court resources and not the best interests of P or D before them: [Sali v SBC](#)
  - HCA in [QLD v JL Holdings](#) disagreed in stating justice is the paramount consideration and denying the right to adjourn proceedings and make amendments could not allow the case to be decided on its merits
  - Overruled in [AON v ANU](#) that rules governing civil litigation are no longer to be directed to the parties of a dispute. Interests of justice for all litigants awaiting hearing is an important whilst determining a case on its merits is not necessarily paramount. (ANU Sought adjournment to introduce new claims 3 days into trial, AON would have to defend them = more time wasted)
  - Reinforced by parliament through the [Civil Procedure Act](#) overarching obligations in preventing an inexpedient approach to litigation that the courts are not hesitant to strictly enforce in line with o1r14: [Eaton v ISS Catering Services](#)
- Court has discretion under [s 47 CPA](#) to actively manage civil cases from an early stage in making orders it deems appropriate and limiting the issues and progress of a case, having regard to administration of justice and public interest.

## Open Justice

Allowing the public to attend proceedings and having proceedings recorded

Benefits:

- Prevents arbitrary power of judges and improves judicial performance: [Scott v Scott](#)
- Ensures public performance in the administration of justice

Exceptions, where justice may not be able to be done in open court:

- Children
- Particularly sensitive issues
- Wards of the state
- Secret matters

## Supreme Court Jurisdiction

To hear a case, the SC must have:

1. Subject matter jurisdiction
2. Territorial jurisdiction over the defendant

### Jurisdiction over Subject Matter

**s 85 Constitution Act (Vic):** The court has unlimited jurisdiction to hear all cases  
Specific legislation may curtail this by restricting, enlarging or modifying this

### Territorial / In Personam Jurisdiction

Court must have jurisdiction over the defendant before they can be brought to answer a claim made by a plaintiff

**Laurie v Carroll:** The time of service the D must be within the boundaries of Victoria, “his amenability depends on nothing but presence within the jurisdiction”

- Even if D was in Vic fleetingly and served, the jurisdiction of the SC is invoked:  
**Wildenstein**
- Unless, fraudulently enticed within the state for purpose of being served (e.g. saying come to vic to play golf and then served = bad)

### Cross-Vesting Legislation

Originally fed courts would hear state matters and state courts would hear fed matters

**Jurisdiction of Courts (Cross-Vesting) Act 1997** passed by state and cth parliaments

- States could hear federal matters
- Federal cannot exercise state powers (DEEMED UNCONSTITUTIONAL: **RE Wakim**)
- Compels a state to transfer to a more appropriate court if in the interests of justice:  
**(s 5(2))** upon judge’s own motion or request of a party

Interests of justice:

- Guiding principal is what the interests of justice dictate on a case-by-case basis, unencumbered by prior decisions
- Transfer to QLD in **DG v Cth Serum Laboratories:**
  - o P resided in QLD, treatment in QLD, cause of action arose in QLD, hospital and doctors in QLD, high degree of inconvenience, expense and hardship for all of these people to come to Vic. QLD had the most real and substantial connection, thus more appropriate court
- Transferred in **BHP v Schultz:**
  - o P lived in SA, claim in NSW, BHP incorporated in vic but business in all states. HC said they make a ‘nuts and bolts management decision’ although the only

criteria for transfer is 'in the interests of justice' not the interests of one party.

- Does not have to show that the court was clearly inappropriate, what has to be shown is that another court is the more appropriate court, starting with the natural forum to hear the case and which court has a closer connection
- More factors in [Best on Parks Management v Sexton](#):
  - Connection between parties, alleged conduct and jurisdiction, choice of jurisdiction clause, cost and convenience to parties and witnesses
  - If it appears this is satisfied the court is obliged to transfer (no discretion) parties were both from SA, alleged breach in SA and express agreement
- Summary in [Irwin v State of QLD](#)
  - Court refused transfer, but stated relevant principles (PARA 14)
    - Not necessary that first court is clearly inappropriate, second court must be more appropriate
    - Interests of justice not interests of one party
    - Nuts and bolts management decision
    - Relevant connecting factors include convenience and expense, availability of witnesses and where parties reside, where wrong occurred, experience of particular court, condition of a party and life expectancy
    - Weight given to each factor will vary case to case
- Clarified in [Mutch v BHP](#)
  - Natural forum is a starting point which will give effect to the reasonable expectation of the parties as to what is in the interests of justice
  - Look at health of parties and factors in Irwin cancel each other out

## Case Management

The case management principles contained in Part 4.5 give clear legislative guidance to judges and magistrates to proactively manage cases so as to ensure that they are conducted in accordance with the s 7 overarching purpose

**47(1):** Court may make any direction so that a civil proceeding is conducted with the overarching purpose

- Setting out timetables
- Controlling deadlines

**48:** Court may make an order for appropriate dispute resolution or attendance of parties at a case management conference

**50:** Court may order the parties to consult and prepare a statement of issues that need determination by the court – simpler than pleadings

## Amendment

**AON v ANU:** In deciding where justice lies, one does not merely look at the merits of the case, but other factors including case management and:

- (a) Delays or costs if amendments made
- (b) Effect on litigants awaiting their case
- (c) Importance of the amendment
- (d) Stage of litigation
- (e) Explanation given by the parties

## Discovery

Effect of s 54 and 55 is that discovery should be undertaken in a timely, cost effective and efficient manner, in addition to r 29 SCR

**S 56 CPA** provides sanctions for failure to comply with obligations regarding discovery, including **(2)(e)** limiting the use of documents in evidence

## Pre trial non compliance

**51:** If a person contravenes the pre-trial and trial processes of the CPA, the court may:

- (a) Dismiss the proceeding (part or whole)
- (b) Strike out or limit any claim or defence
- (c) Strike out or amend any document
- (d) Disallow or reject any evidence
- (e) Direct the person to pay whole or part of another person's costs
- (f) Make any other order