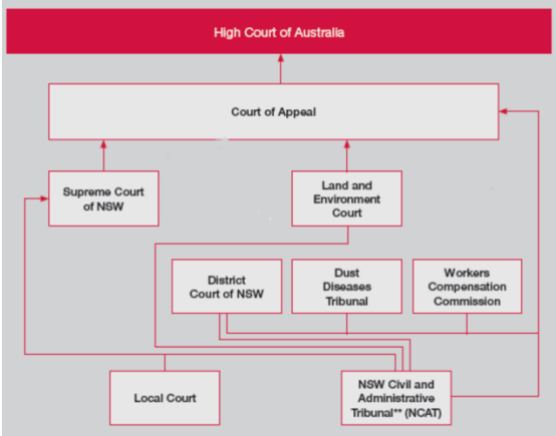
Table of Contents

Fundamentals to Litigation

HCA	• Cth judicial power can only be exercised by the HC (s 71), a federal court created by the Cth Parliament (e.g. Family Court) and State and Territory courts which are vested with jurisdiction pursuant to Ch III of the *Constitution* • Original jurisdiction (ss 75 and 76)
Supreme Court of NSW	• Unlimited civil jurisdiction and handles claims of $750k+ • Established by the *Charter of Justice* in May 1824; now operates under *Supreme Court Rules 1970* and *Supreme Court Act 1970* (NSW) • 2 appellate jurisdictions: Court of Appeal and the Court of Criminal Appeal
District Court of NSW	• Jurisdictional civil limit of $750k and unlimited jurisdiction in claims for damages for personal injury arising out of a motor vehicle accident or a work injury • Court can deal with larger amounts if parties agree • *District Court Rules 1973*

Local Court	• Civil claims up to $100k
	  ○ Small claims division – claims up to $10k
	  ○ General Division – claims between $10k and $100k
	• *Local Court Rules 2009*
	• Jurisdictional limit of $60k for personal injury or death claims

- Basic groundwork in all courts is the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW)
- Rules of evidence which regulate the information that can be used as evidence in the hearing of the substantive cause of action are mainly in CL and *Evidence Act 1995* (NSW)
- Rules which are directed to governing or regulating the mode or conduct of court proceedings are **procedural**; all other provisions are **substantive** (Mason CJ in *Stevens v Head* [1993])



At the crux of the Australian legal system are procedural rules which govern and directly influence the extent to which substantive rules are enforced. This is reflected in the oath to 'well and truly serve' the sovereign and to 'do right to all manner of people after the laws and usages of NSW w/o fear or favour, affection or ill-will'. The constant challenge is thus to strike an equilibrium between the provision of rules that facilitate dispute resolution by providing procedural fairness and due process so that rights can be enforced but, are not so complicated or expensive as to make proceedings inaccessible.

s 56 *CPA*
Overriding purpose of obtaining a 'just, quick and cheap' resolution of the real issues in the proceedings

a. D can seek leave to withdraw an appearance – *UCPR* r 12.5
b. D can seek leave to withdraw any matter that is contained in a defence or subsequent pleadings – *UCPR* r 12.6

Pleadings

- **Pleadings include SOC, defence and reply** but does not include summons or NOM
- Pleadings are binding on parties – this creates incentive for parties to respond
- Purpose is to **state with sufficient clarity the case that much be met**, to **define the issues for decision**, to provide a **permanent record of the boundaries of the case** and to **allow each party a fair opportunity to meet the issues in the proceedings**
    - Expression of the adversarial system – pleadings are prepared by the parties and subject to objections by the opponent
- Aims to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him/her and to define the issues for decision – *ASIC v Rich* [2006]
    - Insert new matters by way of reply wouldn't assist clarification or definition of the issues in the proceedings → proliferation of documentation which wouldn't read logically, delay the trial of the action and add to its expense – *Young v Hones* [2014]
- Pleadings are closed on the delivery of the last pleading – each party must then give adequate notice of the case to be made at trial

- *UCPR* rr 14.6-14.11, 14.14, 14.17-14.20, 14.22, 14.23
- Pt 4 *UCPR* outlines the form of pleadings to ensure transparency, clarity and efficiency in the most important docs of any proceeding
    - Only the effect, not the actual words, of the docs and statements referred to in pleadings must be set out

ASIC v Rich [2006]	Limits to the principle of pleadings • P can attack in cross-examination evidence going to matters raised in a defence, though not in the SOC • Where D adduces evidence purporting to answer P's pleaded case, P is entitled to challenge that evidence in cross-examination even if particular parts of the cross-examination, viewed in isolation, might suggest a different, unpleaded case
Priest v NSW [2006]	• Pleadings also provide the structure upon which interlocutory processes are govern – constitute the record of the matters which the court has resolved and become relevant if, in any subsequent proceedings, any party claims issue estoppel or res judicata – *ACCC v Fox Symes & Associates Pty Ltd* [2005]

Step 1: Pleadings on the SOC (and defence) statutory requirements under Part 14 of the *UCPR*

1. **Material facts** – insufficient simply to assert conclusions of law; pleading must **intelligibly state the facts on which the P relies** for the existence of the claim
    a. Contain only a summary of the **material facts** (critical to supporting each of the elements of the cause of action) on which the party relies for their cause of action, and **not the evidence by which those facts are to be proved** – *UCPR* r 14.7

	inherent jurisdiction to prevent abuse of its process by proceedings which are vexatious i.e. unreasonable • To decide whether the omission to plead can found an estoppel against the assertion of the same matter as a foundation for a cause of action in a 2nd proceeding, look at the **likelihood that the omission to plead a defence will contribute to the existence of conflicting judgments**

- Before commencing proceedings, P must ascertain who is the appropriate party to be sued as this can determine the appropriate causes of action
- Decisions concerning the causes of action that are to be joined in the one proceeding are subject to the decisions concerning the joining of parties
- Parties are bound by causes of action and issues that are resolved by courts – reflects the principle for decisions, unless set aside or quashed, to be accepted as incontrovertibly correct
- 2 broad principles with res judicata:
    - Interest of the **community** in the termination of disputes and in the finality and conclusiveness of judicial decisions
    - Interest of **litigants** in being protected from the repetition of civil actions or criminal proceedings

Step 1: Does the P have standing?

1. Standing is the right of a P to be considered an appropriate party to initiate the proceedings
2. **Not usually an issue in private matters**; however, might be an issue in public matters as they test the constitutional validity of legislation etc.
    a. AG can initiate proceedings wrt a public wrong/grant a fiat to allow a private person to sue
    b. There is no res judicata in constitutional cases because this would be contrary to public policy
3. A party invoking the jurisdiction of a court in respect of an alleged interference with a public right must show that **a private right of that party has been interfered with or that party has suffered special damage particular to himself** – *Truth about Motorways v Macquarie*
4. Party must show it is **aggrieved by the conduct** complained of – *Truth about Motorways v Macquarie*

Step 2: Has the matter already been judged? – res judicata

1. **Res judicata** (a matter already judged) prevents the re-litigation of **claims/issues** determined in earlier proceedings between the **same parties** on the **same subject matter** from the previous judgment to prevent doubling up of judgments
    a. May be **displaced** by proof that the earlier judgement was affected by **fraud or collusion, or a cross-estoppel** by representation. It can also be displaced on public policy grounds e.g. constitutional cases
2. A judicial decision can only give rise to res judicata estoppels if the Court must has delivered judgment and the **decision must be final**
    a. Judgments and orders are final
    b. Interlocutory decisions on procedural questions do not give rise to res judicata
    c. However, interlocutory judgment for damages is assessed as final for RJ purposes

Step 7: Must not disclose the offer to court or arbitrator – *UCPR* r 20.30

1. The fact that an offer has been made may not be contained in any pleading or affidavit
2. If an offer is not accepted, it cannot be disclosed to the court or arbitrator
3. Exceptions to (2):
    a. If offer is not made without prejudice (without prejudice = 'confidential')
    b. For determining the amount of interest up to judgment
    c. After all questions of liability and relief have been determined, to the extent necessary to determine questions as to costs
    d. To the extent necessary for offer to be taken into account for the purposes of s 73(4) of *Motor Accidents Act*

Cost Consequences

Step 8: Where offer is accepted (made by P or D) and no provisions as to costs (*UCPR* r 42.13A)

1. Cost will follow the event on **ordinary basis**
    a. Offer proposes judgment in favour of P: plaintiff can seek order for cost against D **on ordinary basis from date when offer is made**
    b. Offer proposes judgment in favour of D: defendant can seek order for cost against P on **ordinary basis from date when offer is made**

Step 9: Where offer isn't accepted

Offeror	Trial Outcome	Example	Costs Order
Plaintiff	Plaintiff – Equal or Greater than Offer Amount (plaintiff better off)	P sues D and P makes offer for D to pay $1m. Judgment of $2m (better than offer).	• P is entitled to seek cost order against D on **an ordinary basis until offer was made**. • Then **indemnity basis after** (or 11am from the date following the day the offer was made if the trial begun.). *(UCPR r42.14)*
Defendant	Plaintiff – Equal or Less than Offer Amount (plaintiff worse off or same)	P sues D. D offer to pay $2m. Judgment for $1m. P receives less than D's offer.	• P is entitled to seek cost order against D on **an ordinary basis until offer was made**. • D is entitled to seek cost order against P on **an indemnity basis after** (or 11am from the date following the day the offer was made if the trial begun). *(UCPR r 42.15)*
Defendant	Defendant – Equal or Greater than Offer Amount (plaintiff worse off or same)	P sues D. D offers to pay $2m. Judgement for D and P **loses**.	• D is entitled to seek cost order against P on **an ordinary basis until offer was made**. • Then **indemnity basis after** (or 11am from the date following the day the offer was made if the trial begun) *(UCPR 42.15A)*

Step 10: "Unless the court orders otherwise"

1. **Onus is on the offeree** (who had rejected the offer) to show why the Court should depart from the consequence of his rejection of the Offer to "order otherwise" (*Leach v The Nominal Defendant*)
2. The **reasonableness of the rejection** is a relevant consideration – *Leach v The Nominal Defendant*
    a. Must be a **genuine offer of compromise** as opposed to being merely made to trigger cost consequences under the rules – *Leach v The Nominal Defendant*
        i. If offer was tantamount to a surrender and the P's case though difficult, was **not vexatious, frivolous or hopeless**, then court will 'order otherwise' and not grant indemnity costs – *Hart v Boucousis*

        - Give inspection by production of databases containing copies of discoverable ESI created in accordance with an agreed protocol – host and attachment docs mustn't be separated in this process
        - Change original file names to doc identification numbers
    - When parties have electronically stored information, it may be given electronically – Practice Note SC Gen 7(10)
    - See Technology Assisted Review (TAR) and *McConnell Dowell Constructors v Santam* (2016)

- *UCPR* rr 21.1-21.8

Palavi v Radio 2UE [2011]	• Court can sanction P who destroys relevant evidence, including photos and text messages, if it constitutes an attempt to pervert the course of justice • **Deliberate destruction of discoverable material in knowing defiance of discovery obligations** that produces the real risk of impairment to the case of the other side may lead to restrictions on what points litigants can run or to the striking out of all or parts of their claims • Here the fairness of the trial was put in jeopardy by the deliberate – destruction of evidence central to the case rendering further proceedings unsatisfactory in that they would be unfair and unjust to the respondent
McConnell Dowell Constructors v Santam (2016)	• Conducting a manual review of documents (where it is of a substantial size) puts all parties at risk of bearing these costs in the event of losing the case and suffering an adverse costs order • Employing a traditional manual discovery process can work to place the cost-benefit of conducting litigation in a large doc case at serious risk • Not likely to be either cost effective or proportionate

Note: different process for **CL** (Step 2) and **Equity** (check remedies sought e.g. injunction or specific performance – use Step 3 instead)

Step 1: <u>What documents are discoverable?</u>

1. The court may order discovery of (*UCPR* r 21.2(1)):
    a. Documents within class/es from the other party
    b. One or more samples of documents within a class
2. Class of documents mustn't be specified in more general terms than the court considers justified – *UCPR* r 21.2(2)
    a. Must not be **oppressive** in that the class of documents is **too general** and **extremely burdensome** to comply with (*Priest v NSW*). Examples:
        i. Categories are specified in **more general terms** than justified and **cover a lengthy period** (**i.e. too vague or overly broad)** (*Priest v NSW*)
        ii. **"Any" and "all related documents"** (*Priest v NSW*)
        iii. **Note: It is not oppressive** if the documents, even if there are 80 boxes worth, are consolidated in one location (*Priest v NSW*)
    b. Documents may be specified – *UCPR* r 21.2(3)
        i. By relevance to one or more facts in issue

Witness Preparation

- *Oaths Act 1900* (NSW) ss 29, 30, 31, 33

Majinski v State of Western Australia	• Preparation can become coaching where the witness' recollection of the events are 'supplanted' by a version of the events as suggested by the solicitor • Could occur through instructions as to how to speak or the repetition of phrases to the point where the witness' testimony is simply regurgitation

- Purpose is to deal with the legal and evidentiary issues in the case (Legg) – while this is key to effective representation, it may also involve the potential conflict between the duty of the court to act with honesty and candour vs duty to represent a client competently and diligently
- Impossible to resuscitate a witness caught in a lie as it'll discount the credit of their evidence (*Edwards v R* (1993))
    - E.g. omission in an affidavit reflects upon one's credibility (*Li v The Herald and Weekly Times* [2007])

Step 1: <u>What type of evidence will be required to be given?</u>

1. Trial witnesses must give evidence orally before the court for proceedings commenced by **SOC** – *UPCR* r 31.1(1) and (2)
2. Witness may need to be prepared to give their evidence **in writing or orally** or for the cross-examination of the person who made an affidavit, or both – r 35.2
3. Exceptions:
    a. Court may order a witness give evidence by affidavit – r 31.1(3)
    b. Evidence must be given by affidavit if the only matters in question are: **interest of debt/claims, or assessment of damages, or costs** – r 31.1 (4)
    c. Evidence may be given by affidavit **after default judgement in motor vehicle claims** – r 31.1(5) i.e.:
        i. Evidence of the identity of any motor vehicle,
        ii. Evidence of the damage sustained by a motor vehicle in a particular collision,
        iii. Evidence of the reasonable cost of repairing that damage.
4. **Evidence in chief** at any hearing must be by **affidavit** unless court orders otherwise – r 31.2
    a. E.g. on interlocutory proceedings, proceedings commenced by summons

Step 2: <u>Has the lawyer for advising the witness acted improperly in preparing the witness?</u>

1. While a solicitor may prepare a witness by advising what kinds of questions they may be asked and the general court process, a solicitor **must not coach** a witness by suggesting answers, or **advise to give false/misleading evidence** – *LPUL SR* r 24