Lecture 1. Introduction to Criminal Procedure

Part 1. The criminal process, its underlying principles and importance

In practice, criminal procedural law (criminal procedure) controls the balance between state power and the rights of the individual.

1. Common law principles (that influence criminal procedure law principles)

Legislative powers must be understood in relation to existing common law principles that limit such powers, including:

- The **right of personal liberty** – *by placing requirements on police officers*
  - The right to personal liberty cannot be impaired to taken away without lawful authority
  - If arrest
    - reasonable grounds
    - only if the arrest is necessary
- The **presumption of innocence**
  - Until a charge has been proven and person convicted the presumption is to be that they are innocent
- **No detention without legal cause**
- **Arrest as a last resort**
- **No punishment without conviction by due process**
- **A fair trial**
  - *Dietrich v The Queen* (1992) 177 CLR 292
  - Wasn't legally represented – no fair trial
  - The prosecution cannot continue until the offender has found a legal representation
  - The defendants have an adequate opportunity to instruct counsel, and to prepare for and participate in their defence
- **Individualised justice and consistency in decision making**
  - Rule of law: everybody is equal
- **Special provision for young people**
  - Consider their lesser maturity and capacity to make considered decisions
  - Special courts + different procedures + separate legislation
  - A particular emphasis on mediation, reparation, restorative justice and rehabilitation

Dietrich v The Queen

It concerned the nature of the right to a fair trial, and under what circumstances indigent defendants (D who cannot afford legal representation) should be provided with legal aid by the state. The case determined that although there is no absolute right to have publicly funded counsel, in most circumstances a judge should grant any request for an adjournment or stay when an accused is unrepresented.

X7 v Australian Crime Commission

Accusatorial system → accused is not called upon to answer any allegation or charge until the prosecution has made available all evidence of proof of accusation to the accused.
Held → accused has the right to remain silent and test the charges/strength of evidence in court.

Presumption of innocence

The process for the investigation, prosecution and trial of an indictable Commonwealth offence is accusatorial… in the sense that an accused person is not called on to make any answer to an allegation of wrong-doing, or to any charge that is laid, until the prosecuting authorities have made available to the accused particulars of evidence on which it relies.
Even after that information has been provided, the accused need only plead guilty or not guilty. If they do the latter, they are entitled to go to trial and put the prosecution to task to prove the charge and test the strength of the evidence.

Q. Why is criminal procedure important?

Criminal justice actors hold extensive discretion over whether people are diverted or proceed to court, and thus the extent of exposure to criminal justice sanctions.

Social Justice: Outcome & Procedure (T Tyler)

People are more willing to accept decisions when they feel that those decisions are made through a decision-making process they view as **fair**.
Fairness is often evaluated through things such as whether there are opportunities to **participate**; whether the authorities are **neutral**; the degree to which people trust the **motives** of the authorities; whether they are treated with **dignity** and **respect**.

Distributive Justice

Equity theory argues that fairness means peoples rewards should be proportional to contributions. The problem with this is that people tend to exaggerate the importance or value of their contributions. Thus, it is difficult to provide people with the level of rewards they regard as fair, relative to their subjective sense of worth.

Procedural Justice

Research suggests that procedural justice is a more useful mechanism for resolving social conflicts than distributive justice. Procedural justice is based upon the notion that people will be willing to accept outcomes because those outcomes were fairly decided upon.

8. How to determine where an offence will be heard?

Three categories of offences:

- Indictable only
- Hybrid/elective
- Summary only

#indictable only: e.g. murder

- Offences dealt with on indictment are to be dealt with by the Supreme Court (murder and treason and other exceptions mentioned above) or District Court
- Offences ***must be dealt with on indictment unless*** required to be dealt with summarily under the ***Criminal Procedure Act 1986* (NSW) s5** or another Act
    - If it is indictable, check table 1 and 2 of Schedule 1 of CPA 1986 to see whether it is a hybrid offence

#summary only: e.g. offensive language

- Offences permitted or required to be dealt with summarily are to be dealt with by the Local Court (CPA s7)
- Some offences must be dealt with summarily (CPA s6), including:
    - Those required to be finalised summarily by the CPA or other Act
    - Offences labelled as summary offences
    - Offences punished by a maximum penalty up to two years
      - unless it is a **hybrid offence** required or permitted to be dealt with on indictment; and an offence listed in CPA schedule 1, table 1 or 2

#elective or hybrid offences

- The CPA proves that certain offences that are to be dealt with summarily unless an election is made to proceed on indictment – CPA s260
- Table 1 and 2 are in CPA Schedule 1
- **Table 1 offences** (more serious elective offences) – both P and D have the power to elect to proceed on indictment
- **Table 2 offences** (less serious elective offences) – only P has power of election
- **Maximum penalty when dealt with summarily**
    - Schedule 1 Table 1 offences – CPA s267
        - Maximum prison = 2 years (or max provided by law, whichever shorter)
        - Maximum fine = 100 penalty units (or that provided by law, whichever is lowest) (but note provision for specific offences)
    - Schedule 1 Table 2 offences – CPA s268
        - Maximum prison = 2 years (or max provided by law, whichever shorter)
        - Maximum fine = depends on the offence (and sometimes on the value of the property or money concerned in the offence), either 20, 50 or 100 penalty units

CPA

5 Certain offences to be dealt with on indictment

(1) An **offence must be dealt with on indictment** unless it is an offence that under this or any other Act is permitted or required to be dealt with summarily.

(2) An offence **may be dealt with on indictment** if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment.

6 Certain offences to be dealt with summarily

(1) The following offences must be dealt with summarily:

(a) an offence that under this or any other Act is **required to be dealt with summarily**,

(b) an offence that under this or any other Act is described as a **summary offence**,

(c) an offence for which the maximum penalty that may be imposed is not, and does not include, imprisonment for more than **2 years**, excluding the following offences:

(i) an offence that under any other Act is **required or permitted to be dealt with on indictment**,

(ii) an offence listed in **Table 1 or 2** to Schedule 1.

(2) An offence may be dealt with summarily if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment.

7 Certain summary offences may be dealt with by Local Court

(1) An offence that is permitted or required to be **dealt with summarily** is to be dealt with by the **Local Court**.

(2) This section does not apply to an offence that, under this or any other Act, is required to be dealt with summarily otherwise than by the Local Court.

8 Prosecution of indictable offences

(1) All offences shall be punishable by information (to be called an indictment) in the **Supreme Court or the District Court**, on behalf of the **Crown**, in the name of the **Attorney General or the Director of Public Prosecutions**.

(2) Such an indictment may be presented or filed whether or not the person to whom the indictment relates has been committed for trial in respect of an offence specified in the indictment.

Lecture 2 Police Powers and Discretion

2.1 Overview – Policing, Powers and Discretion

2.1.1 Sources of Police Power and Its Regulation [440-452]

- ***Law Enforcement (Powers and Responsibilities) Act 2002*** (NSW) (**LEPRA**)
- LEPRR 2016 (Regulations)
- Common law
- **Consent**
- Other relevant legislation
  - *CPA*
  - *Evidence Act*
- Guidance in certain Codes of Practice
  - E.g., Code of Practice for the NSW Police Force Response to Domestic and Family Violence 2018 (does not have the force of law but gives guidance to police)

Key LEPRA Provisions
Non-compliance with police exercising these powers police may constitute a criminal offence.

Section	Nature of Power
21	Power to conduct personal search
27	Power to carry out search on arrest
31	Strip searches
33	Rules for the conduct of strip searches
36	Powers to search vehicles
99	Power to arrest
114	Detention after arrest for the purposes of investigation
146	General authority to use drug detection dogs
148	General drug detection with dogs in authorised places
197	Move-on directions in public places
198	Move-on directions for intoxicated persons
200	Limitations on move-on directions
230	Use of reasonable force by police officers
231	Use of force in making an arrest

Theme: Individual Rights and the Criminal Procedures

- "A police service which cannot act due to lack of discretionary power is near useless; a police service whose acts are free from check or oversight is likely to be dangerous."
  - Gareth Griffith, Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001, Briefing Paper No 11/2001 (NSW Parliamentary Library Service)
- How does the law regulate police powers over individuals?
  - Legislation granting police powers "seeks to reconcile in a balanced manner the conflicting interests involved in ensuring the efficacy of police investigations … and respecting the rights of citizens" – Spigelman CJ in *Rondo*

Consent

If a person consents to police request (e.g. to assist with police inquiries, provide bag for search, provide identification etc), policy rely on a person's consent for their authority to act not on a statutory power, and thus the requirements imposed on the use of that power and the limitations on the powers do not apply.

Analyse problems

1. **Has the person consented?**
   - e.g., ***S and J*** (1983) 32 SASR 174
   - If yes, no issue of police power arises
   - "protected suspects": s110 LEPRA
2. **If not consent, which power are the police exercising?**
3. **Have the police complied with the law relating to that power?**

What is the central mechanism used to manage the tension with the role of police?

- General rule: police cannot enter private home without consent of resident. (s82 LEPRA – entry by invitation in DV situations)
- Where there is no consent, there are 2 key mechanisms used to manage the tension within the role of police:
  1. **Suspects** on reasonable grounds (Pt 3 *LEPRA* – search and seize powers **without** warrant)
  2. **Believes** on reasonable grounds (Pt 5 *LEPRA* – search and seize powers **with** warrant)

"Reasonable Suspicion": A Prerequisite for Police Powers

Without warrant "suspects on reasonable grounds" = a precondition for police powers in LEPRA

A police officer may

- **s11**(1) require disclosure of identity if the officer **suspects on reasonable grounds** that the person may be able ...
- **s21**(1) without a warrant, stop, search and detain a person ... if the police officer **suspects on reasonable grounds** that e.g., the person has ... anything stolen ...
- **s36** (1) without a warrant, stop, search and detain a vehicle if the police officer **suspects on reasonable grounds** that e.g., the vehicle contains ...anything stolen ...

2.3 Arrest without a Warrant

An officer may arrest, without warrant, a person who is caught committing an offence or committed an offence, or a serious indictable offence for which they had not been tried.

***LEPRA* s 99** (arrest without warrant),
***LEPRA* ss 230-231** (the use of force)
Crimes Act 1900 (NSW) **s546C** (resisting etc police)

- **They must not arrest a person for taking proceedings unless they suspect on reasonable grounds they would not appear before court in respect**, **they would continue/repeat offence**, **they would destroy/conceal/fabricate evidence or harass/interface witnesses or cause harm to other people**. An officer who arrests must as soon as practicable take the person before an authorised officer to be dealt with by law.

Requirement for lawful arrest under s99 *LEPRA*

1. **Has an arrest without a warrant been made?**
2. **Is the arrest lawful?**
   - Has the officer satisfied **ss99(1)(a) *LEPRA***?
   - Was the arrest made for the purpose of commencing proceedings?
   - Has the officer satisfied **ss99(1)(b) *LEPRA***?
   - Did the arresting officer provide information set out in LEPRA Part 15 (Safeguards) unless it was not reasonably practicable to do so?
3. **Might the arrest be improper?**
   - Was the arrest used as a last resort?
   - Was any force used unreasonable? (**s231 *LEPRA***)

2.3.1 Purpose of Arrest

The power to arrest a person under s99 of LEPRA can only be for the purpose of brining that person before a magistrate or justice to answer a charge and to be dealt with according to law.

LEPRA s99

99 Power of police officers to arrest without warrant

(1) A police officer may, without a warrant, arrest a person if—
  (a) the police officer **suspects on reasonable grounds** that the person is committing or has committed an offence, and
  (b) the police officer is **satisfied that the arrest is reasonably necessary** for any one or more of the following reasons—
    (i) to stop the person committing or repeating the offence or committing another offence,
    (ii) to stop the person fleeing from a police officer or from the location of the offence,
    (iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,
    (iv) to ensure that the person appears before a court in relation to the offence,
    (v) to obtain property in the possession of the person that is connected with the offence,
    (vi) to preserve evidence of the offence or prevent the fabrication of evidence,
    (vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,
    (viii) to protect the safety or welfare of any person (including the person arrested),
    (ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.
Note. The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer—see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5.

LEPRA ss230, 231

230 Use of force generally by police officers

It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

231 Use of force in making an arrest

A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

- Limits: force that is "reasonably necessary" → reasonableness will depend on the circumstances

- Common law rule: ***Williams v The Queen***
    - Arrest must be made for the purposes of commencing proceedings;
    - It is not lawful to arrest for the purpose of investigating or questioning.

2.3.2 Arrest as a Last Resort

In *Carr* re. The common law principle of arrest as the "last resort"

- Inappropriate for powers of arrest to be used for minor offences where D's name and address are known, there is no risk of him departing and no reason believe that s summons will not be effective;
- Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear.

2.3.3 How Might an Arrest be Unlawful?

- Arrest for a purpose other than taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. – ***Robinson***
- No reasonable grounds for suspicion. – ***Rondo***
- Not satisfied arrest is necessary for one of the purposes set out in s99(1)(b) – ***Williams v DPP***
- Arrest is not used as a last resort. – ***DPP v Carr***
- Excessive force is used

2.3.4 Potential Consequences of Unlawful Arrest

- Exclusion of evidence under s138 *EA*
- Defence to offences against police "acting in execution of duty": (*Williams v DPP*)
    - s546C *Crimes Act 1990* (NSW), resisting etc; and
    - s60 *Crimes Act 1990* (NSW), Assault Police (inc. aggravated versions)
- Damages for false imprisonment
- Tort of battery against police

2.3.5 How is an Arrest Affected?

- Arrest = deprivation of liberty
- An arrest occurs whenever it is made plain by what was said and done by the police officer that the suspect is no longer a free person. Words may be sufficient ... but they are not always necessary.' ***O'Donoghue*** (1988) 34 A Crim R 397, 401 (NSWCCA)
- May involve seizure or mere touching or advising of fact of arrest
- For an arrest by mere words to be legally valid, person must submit
- Unless not reasonably practicable person must be informed that he/she is under compulsion and reasons for arrest: ***Christie v Leachinsky*** [1947] AC 573, but see Part 15 LEPRA (safeguards: ss201-201, 204A)

NSW v Robinson [2019] HCA 46

(see in particular the majority judgment of Bell, Gageler, Gordon and Edelman JJ)
The power to arrest a person under s99 of LEPRA can only be for the purpose of bringing that person before a magistrate or justice to answer a charge and to be dealt with according to law.

Bell, Gageler, Gordon and Edelman JJ at [110]: **an arrest under s 99 can only be for the purpose,** as soon as is reasonably practicable, **of taking the arrested person before a magistrate** (or other authorised officer) **to be dealt with according to law** to answer a charge for that offence. **An arrest merely for the purpose of asking questions or making investigations** in order to see whether it would be proper or prudent to charge the arrested person with the crime is an arrest for an improper purpose and **is unlawful**.

S and J (1983) 32 SASR

Facts: the case involved the detention for questioning of **two indigenous teenagers** suspected of breaking and entering. The police involved said that they had not carried out a formal arrest as the youths had agreed to accompany them to the station and assist in their inquiries.

Re. whether consent to assist or apprehension

if circumstances are such that the words uttered, though invitation or request, would objectively convey to reasonable person that they had no genuine choice, then it is incumbent upon police officer to make it clear; if not, it may constitute an apprehension.

- 2 things which the police officer must do once the substantial ambiguity arises in the mind of a reasonable person:
    (1) They must inform the suspect that the suspect he is not under arrest; and
    (2) They must inform him that he is free to refuse to accompany them, that is, he is free to go.

Carr [2002] NSWSC 194

Facts:

- Constable Robins was on patrol in Wellington when he saw rocks being thrown by another towards Carr and Carr threw back them; then a rock was thrown and hit the police vehicle.
- CR. CR left the vehicle and asked Carr to assist as to who had thrown the rock at the police vehicle.
- Carr, who moderately affected by liquor believing he was a suspect, refused to tell him and commenced to walk away yelling and swearing "***Fuck off. I didn't fuken do it. You can get fucked***."
- CR knew the identity and residence of Carr, and was aware that summons could be issued. However, an arrest for offensive language was announced and Carr was taken by the arm. Carr allegedly pushed the officer and then ran away, was pursued for about 25 metres, then crash tackled to the ground. Carr was then taken in custody to the local police station.

Issue: **whether or not the police had misused their discretion to arrest**

Held: Yes, and a series of charges (offensive language, resisting arrest and assaulting police) **against Carr are dismissed**

- Magistrate Heilpern: evidence from the police officers relating to these charges should be excluded under s138 of the *Evidence Act 1995*, because it had been obtained as a result of an ***improper*** act – the ***arrest*** of Carr for offensive language in circumstances where it would have been appropriate to proceed by way of summons or field court attendance notice.
- **Arrest as last resort!**
    - It is **inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known**, there is **no risk of him departing and there is no reason to believe that a summons will not be effective**.
    - **Arrest is an additional punishment** involving deprivation of freedom and frequently ignominy and fear.
    - The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police.

Williams v DPP [2011] NSWSC 1085

Facts: *potential defence to where the "execution of duty" is an element of offence, e.g., for s546C Crimes Acts 1990*
two police officer were attempting to arrest a young man at a community hall for allegedly shoplifting three weeks earlier. His mother and brother, who were present at the scene, intervened, asserting that the police had no grounds for an arrest. They attempted to pull an officer's hands off the young man so as to release him. They were charged with hindering police under s546C of the *Crimes Act* (NSW) and convicted in the Kyogle Local Court.

Issues:

- whether the power of an officer to arrest without warrant on the basis of reasonable suspicion, the power found in s99(2), is constrained by s99(3), which states that the arrest must be not carried out unless Police suspect it is necessary to achieve one of the stated purposes in the subsection, examples of which include to ensure the attendance of the person at Court; and
- whether or not the arrest complied with s99(3) → the police had not complied with s99(3)
- whether the arresting officer was acting "in the execution of duty" → no

Held (in the NSW Supreme Court): the **convictions to be set aside** on the basis that the officers were **not acting in the execution of their duties** because they **did not have grounds for a lawful arrest** under s99 of the *LEPRA* 2002.

- An arrest must comply with LEPRA s99(3) to be lawful. The power to arrest in s99(2) is subject to s99(3).

Lecture 3. Bail and Appeal

3.1 Bail

Process of bail consideration		
Preamble		
the right to release		S21
Flow chart + show cause requirement		Ss16, 16A, 16B
Unacceptable test and bail conditions	Assessment of bail concerns	S17
	Matters to be considered as part of assessment	S18
	Refusal of bail, unacceptable risk	S19
	Appropriate circumstances to impose bail conditions	S20A
Types of bail conditions		Ss23, 25, 26, 27, 28, 29, 30
Non-compliance with bail conditions		Ss77,79
Evidence	Rules of evidence do not apply	S31
	Matters to be decided on the balance of probabilities	S32
Detention application	Prosecutor may make detention application	S50
	Multiple release or detention application to same court not permitted	S74

3.1.1 What is Bail - *Bail Act 2013* (NSW)

7 What is bail

(1) **Bail is authority to be at liberty for an offence**. (**Note**. An offence includes an alleged offence.)

(2) Bail can be granted under this Act to any person accused of an offence.

(3) A person who, because of bail, is entitled to be at liberty for an offence is entitled (if in custody) to be released from custody.
Note. Limitations to the entitlement to be at liberty are specified in section 14

Q. Does the common law permit the refusal of bail as punishment?

- The denial and policing of bail often inflict substantial pre-trial punishments and challenges the practical effect of central due process notions such as the presumption of innocence.
- Unemployed people are at a disadvantage because they are judged to be less reliable and have lesser ties within the community than employed persons and consequently more at risk of absconding (fleeing and avoidance of capture) on bail. Unrepresented accused was also found to be less likely to receive bail.
- Consider also Malcolm Feeley's assessment in *The Process is the Punishment* (1979)

The Process is the Punishment – Malcolm Feeley

Criminal justice process can be divided into: (1) determining culpability and (2) administering punishment (guilt/sentence).
In many cases, especially summary matters, the process is the punishment:

- The range of informal sanctions built into the process shifts the locus of punishment and central concern away from adjudication and sentencing to the 'preliminary' stages of the process

Efforts to increase fairness by making the system more deliberate may in fact produce precisely the opposite results.

- May make the process more costly (a punishment which would be meted out to the guilty and the innocent)

Further notes:

- For many, punishment, in the form of arrest, detention, denial of bail, prolonged pre-trial custody in police cells precedes formal legal adjudication of guilt.
- This is especially true in relation to summary justice, where the adjudication of guilt will only lead to a fine.

3.1.2 The Role of Bail in the Criminal Justice System

Competing Imperatives

- "The Bail Act endeavours to strike a balance between the need to protect the community from unacceptable risks associated with the release of people charged with offences on the one hand, and the need to respect the liberty of these citizens as they await their trial on the other hand. Neither side of that equation is necessarily or obviously entitled to more weight than the other." - *Hawi* [2014] NSWSC 837 (Harrison J) – (refer BA 2013 before 2014 amendment)

3.1.4.2 Show Cause Offence

How should the bail authority determine why detention is not justified?
Two-step approach:

1. cause must first be shown as to why detention is not justified, and;
2. if it shown, the bail authority must then consider the unacceptable risk test.

16 Flow charts—key features of bail decisions

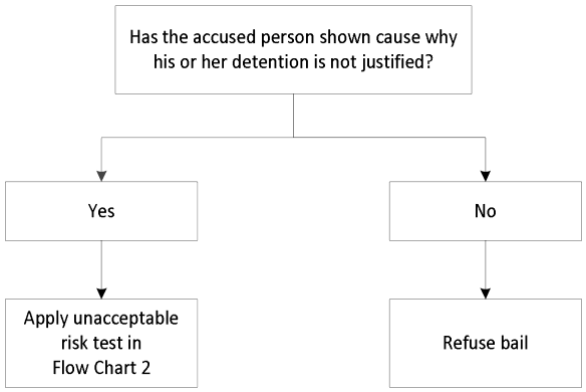
(1) The flow charts illustrate the key features of bail decisions under this Act.
(2) Flow Chart 1 illustrates the show cause requirement (set out in Division 1A), which applies only to show cause offences.
(3) Flow Chart 2 illustrates the unacceptable risk test (set out in Division 2) as it applies to all offences, other than offences for which there is a right to release.
(4) In the flow charts:
conditional release means a decision to grant bail with the imposition of bail conditions.
unconditional release means a decision:
(a) to release a person without bail, or
(b) to dispense with bail, or
(c) to grant bail without the imposition of bail conditions.

A. Show Cause Requirement

Does the "show cause" requirement apply? (Flow chart 1 + s16B)

- the accused bears the onus to establish that their detention is not justified
  - the Bail Act 2013 (NSW) does not prescribe what must or might be considered in determining why detention is not justified (*Tikomaimaleya*)
  - if cause is shown the bail authority must then consider the unacceptable risk test.

Flow Chart 1 Show cause requirement



Judicial Guidance of "Show Cause" Requirement

- Every bail application presents its own unique factual matrix, therefore decisions of a single judge of the Supreme Court provides guidance, but is not binding. – *DPP v Zaiter* (p351)
- Each case must be assessed according to its own facts and circumstances. A particular factor or (more usually) a combination of factors may result in an accused showing cause. – *Woods v DPP* [2014] VSC 1 per Bell J
- Cause does not require something special and exceptional – *DPP v Tony MAWAD* [2015] NSWCCA 227
- The primary consideration is the strength of the prosecution case (*Lacey v DPP* [2017] QCA 413), but is not limited to that. – *Kirby v R*
- The primary consideration is whether the accused will attend court and comply with bail conditions. This is relate to the strength of the prosecution case because the concern is that a defendant is more likely to flee if the case against them is strong – *Re Asmar* [2015] VSC 487
- Effect of a verdict of guilty: "the jury's verdict of guilty is plainly germane to the question whether cause can be shown that his continuing detention is unjustified, since the presumption of innocence, which operated in his favour before the jury returned its verdict, has been rebutted by that verdict." – *Tikomaimaleya*
- Effect of a plea of guilty (*R v Tasker*, per Button J)
  - The applicant is no longer entitled to the presumption of innocence
  - Any weakness or gaps in the Crown case have become irrelevant
  - There is no prospect of the applicant being acquitted
  - There is no prospect of the applicant being convicted of a less serious alternative
  - Although a substantial period of imprisonment being imposed was always very likely, it is now inevitable

Matters may be Sufficient to Show Cause

- Low level offending (even where the risk of reoffending is high) – *R v Awad*; *R v Roy Mcmahon*
- Aboriginality: where refusing bail would perpetuate the cycle of disadvantage but conditions may be imposed that are calculated to break that cycle – *R v Alchin*
- Cause may be shown where residential rehabilitation is available – *R v Benzce*; *Yates*; *R v Stanley*; *Kangas v R*
- Where appropriate medical treatment is not available in custody – *R v Najem*
- Where the accused is terminally ill – *DPP v Boatswan*
- Where the adjournment period is short – *R v Anderson*
- Where the adjournment period is long – *R v Kirby*
- Mental illness and brain damage can constitute cause – *R v Burke*
- Being young and in custody for the first time – *R v Goodwin*

#legislative constraints

- A rejection of an approach to reform sentencing law that would constrain judicial discretion (NSWLRC, Sentencing, 1996)
- Act hardly any statutory formations on how to hand down sentences, HUGE importance of discretion
- Some guidance, but few strict and enforceable guidelines
- S 21 A " Aggravating, mitigating and other factors in sentencing = closest to guidelines, examines what to look for etc, what should be taken into account
  o VERY SIGNFICANT FACTOR " guilty plea = maximum discount available for plea of guilty BEFORE committal = 25%, after the committal, 12.5%

5.3 Sentencing

When deciding sentence

- Check the maximum sentence – in the original crime legislation
- Check the standard non-parole period
- Nature of offence – what purpose of sentencing will we need to invoke?
- Check if there are any guideline judgements
- Check if there are any mitigating/aggravating factors
- Check if there are any reductions for guilty plea/assisting law enforcement
- List reasons for deviation from SNPP [standard non-parole period]

5.3.1 Prescription of Maximum Penalties

- CSPA s4 Penalties generally (extract)
- General power to reduce penalties (s 21 CSPA)

CSPA s4 Penalties generally

(1) The penalty to be imposed for an offence is to be the penalty provided by or under this or any other Act or law.
(2) The penalty to be imposed for a statutory offence for which no penalty is so provided is imprisonment for 5 years.
(3) Part 3 applies to the imposition of all penalties imposed by a court, whether under this Act or otherwise.

CSPA s21 General power to reduce penalties

(1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.
(2) If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term.
(3) If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.
(4) The power conferred on a court by this section is not limited by any other provision of this Part.
(5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties.

Compare to mandatory penalties – "life imprisonment" for murder, non-parole of 20+ years in Qld, or mandatory life sentences for murder of a police officer in NSW.

5.3.2 Imprisonment – last resort

Imprisonment as last resort: can only impose if court is satisfied that no other penalty is appropriate.

- if have to be so, should give reason and there's no other alternative punishment
- less 6 months: more harm than short – because not enough and destructive
  - If imprisonment is less than 6 months, the judge has to explain why gaol is appropriate and why not rehabilitation. Shorter sentences are costly, counter-rehabilitative, hugely draining of resources and of questionable utility.

Steps:

(1) are there any alternatives to imprisonment appropriate? – s5(1)
(2) determine the term of the sentence – s5(2)
(3) determine the manner in which the sentence is to be served (e.g. ICO, or full-time custody)
(4) explain the sentence imposed

Also:

- the court is to set the non-parole period – s44
- the court may decline to set a non-parole period if it deems it appropriate -s45
- a court may not set a non-parole period for sentences less than 6 months – s46
- when a court imposes a 3 years+ sentence with a non-parole period, the court must make an order directing the release of the offender on parole at the end of the NPP period -s50
- sentences are usually backdated to take account of pre-trial custody -s24

Topic 6. Process, Open Justice and Fairness
Adversarial System of Civil Litigation

6.1 Procedural Law

Substantive law vs. Procedural law

- Substantive law
  - The law that defines legal rights, duties, and liabilities
  - Applicable law is the law of the place where the wrongful act was committed
- Procedural law
  - The law that governs the conduct of proceedings before the court: "**rules which are directed to governing or regulating the mode or conduct of court proceedings**"
  - Regulates the way in which substantive rights and obligations are claimed and enforced, without impacting on the definition of those particular substantive rights
  - described as 'adjectival" law

6.1.1 Purposes of Procedural Law

- to provide rules that facilitate dispute resolution
- to provide procedural fairness and due process to litigants
- to promote access to justice
- to address issues of cost and delay
- to promote the legitimacy of the legal system

Why are the rules important? – Hazel Genn "Introduction: What is Civil Justice for?" p3 KLVM

- the answer is that the rules guarantee procedural fairness, and procedural fairness is important both in its own right and through its link with substantive justice.
- It has been argued that legal procedure is 'a ritual of extreme social significance' and that the characteristics of a 'civilised country' are revealed not so much through the substantive law as in the practice and procedure of the courts.

6.1.2 The features of Civil Procedure

Private	Public
Resolution of disputes to prevent "blood feuds, rampant crime and violence" (quoting Bayles)	Adjudication is a public statement of norms and values
Provides a means of ***enforcing*** rights	Reinforcement of the authority of the state
Provides a means of ***accessing*** rights	It is the rule of law in operation
Procedural rules ensure fairness in the operation of the system (btw the parties)	Procedural rules ensure fairness in the operation of the system (as a whole)

6.1.3 Sources of Civil Procedure Law

Applicable in NSW

- ***Civil Procedural Act 2005*** (NSW)
- ***Uniform Civil Procedure Rules 2005*** (NSW)
- Court Rules
  - E.g. *Supreme Court Rules 1970*; *District Court Rules 1973*; *Local Court Rules 2009*
- Court Acts
  - E.g. *Supreme Court Act 1970*; *District Court Act 1973*; *Local Court Act 2007*
- Practice Notes
  - Created by Judges in accordance with power granted by CPA and UCPR
- Inherent power of courts to regulate their processes and prevent an abuse of process
  - E.g. *Ashby v Commonwealth of Australia*
    - "The Courts have an unlimited power over their own processes to prevent those processes from being used for the purposes of injustice….Proceedings that are seriously or unfairly burdensome, prejudicial or damaging, or productive of serious and unjustified trouble or harassment are examples of abuse of process. So too are proceedings where the Court's process is employed for an ulterior or improper purpose, or in an improper way, or in a way that would bring the administration of justice into disrepute among right thinking people"

- Mediation – 3rd party that helps in settlement of dispute
- Ombudsman – the 3rd party is a public official
- Private judging

6.7.3 Main Type of ADR – Negotiation

- Negotiation involves no third party whose roles is to facilitate, advise or determine the resolution of the dispute
- The parties are very much left to their own devices as t to how the negotiation proves should proceed and what the substance of the negotiation should be about.
- Legal practitioners will often find themselves acting as the agent or advisor to a party involved in negotiations
- "positional" v "interest-based" negotiation strategies

Positional negotiation	Interest-based negotiation
Parties are opponents or adversaries	Parties are collaborative problem solvers
Goal is to win or give up as little as possible	Goal is to satisfy all parties' interests
Assert correctness of position/demand	Identify interests
Make minimal concessions in relation to position	Develop options and expand the pie
Avoid disclosure of information – communication is limited	Share and seek out information – enhanced communication
Assert rights that support position	Determine independent criteria for assessing options
Disagree with opponents position	Listen to parties explication of their interests
Make concessions slowly and incrementally to try and obtain agreement	Evaluate options to satisfy interests

6.7.4 Main type of ADR - Mediation

Mediation (the most widely used form of ADR) involves appointing a third-party mediator to assist in identifying issues, options and alternatives, and can be consensual or court-mandated. The courts' power to do so is outlined in *CPA s25-34*.

Summary

- The court may **make a compulsory** order to refer the proceedings to mediation – CPA s26. This is a **wide discretion** and the Court should approach it without any predisposition so that all relevant circumstances can be accounted for. – *Higgins v Higgins*
- Parties have a **duty to participate** (CPA s27), and the costs are either ordered by the court or split by agreement by the parties – CPA s28.
- The court may give effect to any agreement arising out of ADR, and the parties may call evidence from the mediation only to show an agreement has been reached and as to the substance of that agreement – CPA s29.
- All other information exchanged and proceedings occurred in the mediation are **privileged** and are not to be admitted as evidence (CPA s30(4)). However, if there is consent by both parties and all those present at the mediation, then it may be admitted (CPA s30(5)). Alternatively, a mediator may disclose information if any of the circumstances in CPA s31 are satisfied.
- A mediator may give directions as to the procedure of the mediation – CPA s32
- A mediator has the same liability indemnity as a judge of the court – CPA s33
- This act does not exclude mediation organised otherwise than in accordance with the Act – CPA s34

Civil Procedure Act 2005

25 Definitions In this Part: ***mediation*** means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute. ***mediation session*** means a meeting arranged for the mediation of a matter. ***mediator*** means a person to whom the court has referred a matter for mediation.	
26 Referral by court (1) If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned. (2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator. (2A) Without limiting subsections (1) and (2), the court may refer proceedings or part of proceedings for mediation under the *Community Justice Centres Act 1983*. (3) In this section, listed mediator means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.	
27 Duty of parties to participate It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.	***Higgins v Higgins***: Dispute between mother and son ***Waterhouse v Perkins***: P sued D for defamation => Parties must act in good faith in mediation

Topic 7. Matters Preceding Litigation and Commencing Proceedings

7.1 Matters Preceding Litigation

Before Commencing Proceedings

- **When** to commence (limitation period)
- **Where** to commence (which court has jurisdiction)
- **Who** to commence against (preliminary discovery only when you don't know)
- **What** orders are necessary to preserve evidence or assets (search orders and freezing orders)
- **What** to commence with (originating process: statement of claim, summons, commercial list statement)
- **How** to bring proceedings to the attention of the defendant

Two important terms s3 CPA
Plaintiff → a person by whom proceedings are commenced, or on whose behalf proceedings are commenced by a tutor, and includes a person by whom a cross-claim is made or on whose behalf a cross-claim is made by tutor.
Defendant → a person against whom proceedings are commenced, and includes a person against whom a cross-claim is made.

Jurisdiction → limitation period → statement of claim → summon

7.1.1 Jurisdiction 287-294 / 6.10-6.40

Before court proceedings can be commenced, a prospective plaintiff will need to consider whether the court in which it is proposed to commence proceedings has jurisdiction to hear the case.

- Depend on subject matter and value of the claim
- If the plaintiff seeks equitable relief (court ordered action that directs parties to do or not to do something) then it can only be granted by the Supreme Court (District Court has some equitable jurisdiction)
- If a party seeks a legislative remedy it must sue in the court or tribunal specified by the legislation
    - E.g. a building claim pursuant to the *Home Building Act 1989 (NSW)* is brought in the Consumer, Trader and Tenancy Tribunal

The claim for damages: (NSW State civil limits)		
<$20k	**Local Court** small claim division	s 29(1)(b) Local Court Act 2007
<$100k ($60k for personal injury or death)	**Local Court** general division	s 29(1)(a)+ s.29(2) Local Court Act 2007
<$750k → can deal with larger amounts if the parties agrees → unlimited in some areas, e.g., motor accident	**District Court**	s.4 (definition) District Court Act 1973
> $750k	**Supreme Court**	s.23 the Supreme Court Act 1970
Note: for SC, there 2 divisions: • Common law division → hears civil, criminal and administrative law matters • Equity division → hears commercial law, corporations law, equity, trusts, probate and matters pursuant to family provisions legislation		

Jurisdictional Cross-vesting

Authorised by legislation:

- Federal Jurisdiction: *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth)
- NSW Jurisdiction: *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW)

**Deference should not automatically be given to plaintiff's choice of forum when determining transfer application.

Factors to consider

- The place or places where the parties and/or witnesses resides or carry on business
- The location of the subject matter of the dispute
- The importance of local knowledge to the resolution of the issues
- The law governing relevant transactions
- The procedures available in the different courts
- The likely hearing dates in the different courts
- Whether it is sought to transfer the proceedings to a specialised court, i.e., the Family Court

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s4: confers federal jurisdiction on State courts	***BHP Biliton Ltd v Schultz*** = transfer from tribunal to Supreme Court = court required by statute to ensure that cases are heard in forum dictated by interests of justice = shows that P's choice of tribunal and the reasons for it are not to be taken into account in determining whether the proceedings should be transferred to another court → Choosing an appropriate court usually involves looking at considerations of cost, expense and convenience.

7.1.2 Limitation periods in NSW 295-326 / 6.60-6.140

- Limitation periods establish the time within which a claim must be brought or else it is forfeited
- In NSW, if more than one cause of action is pleaded, the applicable limitation period is the earliest – *Limitation Act 1969* (NSW) s13
- NSW courts can exercise QLD jurisdiction (Cross Vesting Act) if the event occurred in QLD but the person has moved to NSW; but the limitation period is that of where the event occurred (QLD)
- If a person is under a disability (minor without a capable guardian, incapacitated person for continuous 28 days without a protection), the limitation period is suspended for the duration of the disability, and facts that ought to be known by a capable parent/guardian are taken to the facts that ought to be known by the minor or incapacitated person – *Limitation Act* s50F
- Rationale for limitation periods
    - *Brisbane South Regional HA v Taylor* (1996) 186 CLR 541, McHugh J:
        - Where there is delay the whole quality of justice deteriorates: *Lawrence* [1982] AC 510
        - Destruction of evidence → whether apparent or not
        - Oppressive and cruel to pursue D after many years
        - People unable to order affairs with lingering potential lingering potential liabilities
        - Public interest demands quick settlement of disputes

Limitation Act 1969 (NSW) s 13 More than one bar
Where, under each of two or more provisions of this Part, an action is not maintainable if brought after a specified time, the action is not maintainable if brought after the earlier or earliest of those times.

7.1.2.1 Specific Limitation Periods

Cause of action	Period
Contract	s 14(1)(a): 6 years from the date on which the cause of action accrues to the plaintiff (i.e. the date of breach)
Tort	s 14(1)(b): 6 years from the date on which the cause of action accrues to the plaintiff
Defamation	s 14B: 1 year from the date of publication of the matter complained of
Judgment	s 17: 12 years from the date on which the judgment first becomes enforceable
Recovery of Land	s 27(2): 12 years from the date on which the cause of action accrues to the plaintiff
Breach of Trust	s 48: 6 years from the date on which the cause of action accrues to the plaintiff
Personal Injury after 5 Dec 2002	s 18A for claims prior to Dec. 6, 2002: 3 years from the date the cause of action accrued s 50C for claims on or after Dec. 6, 2002: • 3 years from the date on which the cause of action is discoverable by P; • or 12 years from the act or omission alleged to have resulted in the injury, whichever is the first to expire.

7.1.2.2 Personal Injury

- Personal injury provided for in *Limitation Act* s50C
    - (1a) 3 year post-discoverability limitation period; which begins on the day (inclusive) when the cause of action is discoverable by the plaintiff
    - (1b) 12 year long-stop limitation period, which is 12 years from the occurrence of the omission/act that resulted in the injury/death
- The meaning of "*discoverable*" for the purposes of the 3 year post-discoverability period, is taken to mean the day the person knows, or ought to have known (had they taken reasonable steps) tha, as provided for in *Limitation Act* s50D:
    - The fact the injury/death occurred, and
    - It was caused by the defendant, and
    - In the case of injury, it was sufficiently serious to justify bringing an action

7.1.2.3 Disability

- the limitation period can be suspended or postponed where P is under a disability – s52 *Limitation Act 1969* (NSW)
- s11(3) defines disability

11 Definitions

(3) For the purposes of this Act a person is under a disability:

(a) while the person is under the age of eighteen years, or

(b) while the person is, for a continuous period of twenty-eight days or upwards, incapable of, or substantially impeded in, the management of his or her affairs in relation to the cause of action in respect of the limitation period for which the question arises, by reason of:

i. any disease or any impairment of his or her physical or mental condition,

ii. restraint of his or her person, lawful or unlawful, including detention or custody under the *Mental Health Act 1958*,

iii. war or warlike operations, or

iv. circumstances arising out of war or warlike operations.

7.1.3 Preservation Orders 331-345/6.170-6.210; 346-353/6.220-250

A court may make an order for the applicant to search for an evidence (search orders), or preserve property or assets (freezing orders), and can be obtained on an ex parte basis.

- In an urgent case, the court can make an order before the commencement of proceedings: UCPR r 25.2(1)(c)
- UCPR Part 25
- Practice Note SC Gen 13 – Search orders
- Practice Note SC Gen 14 – Freezing orders

7.1.3.1 Search Order → to permit persons to enter premises and search for, inspect, copy and remove things described in the order. It is designed to preserve important evidence pending the hearing of the claim.

- aka Anton Piller orders (UCPR r 25.2(1)(c))
  - *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55
- Authorise the seizure of documents and other evidence in order to protect the evidence from destruction
- Application usually made *ex parte*
- Order allows the applicant's legal representatives and an independent supervising solicitor to enter the respondent's premises to search, copy documents and remove property
- Power to grant a search order UCPR s 25.19
- **Note**:
  - a search order cannot be used as an investigatory tool – *Findex v McKay* [2019] NSWCA
  - not to create general security for the plaintiff (*Jackson v Sterling Industries Ltd*)
  - connection between third party and judgment debtor required (*Cardile v LED Builders Pty Ltd*)
  - *Austress Freyssinet Pty Ltd v Joseph* [2006] NSWCA 77
    - the harm likely to be caused by the Anton Piller order to the defendants and their business affairs must not be excessive or out of proportion to the legitimate object of the order especially when it will allow the perusal of the plaintiff of the defendant's confidential documents.

Requirements

- The requirements for a grant of a search order are outlined in UCPR r25.20 - p325:
  (a) the applicant has a strong prima facie case, and
  (b) the potential/actual loss/damage to applicant will be serious if order is not made, and
  (c) important evidence and real possibility of destruction.
- Terms of search order – UCPR r25.22
- The court must appoint an independent solicitor to supervise execution of the order - UCPR r25.23
- The court may make an order to costs it sees fit to be the just compensation to any person affected by the operation of a search order - UCPR r25.8 → 'usual undertaking as to damages'

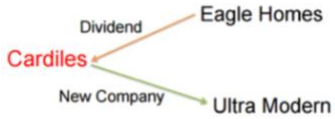
7.1.3.2 Freezing Orders → to prevent frustration or abuse of the process of the court.

- Known as Mareva relief/injunction – UCPR r 25.2(1)(c)
- Can be granted *ex parte*
- It is an extraordinary interim remedy because it restricts the right to deal with assets
- Can be made against 3rd parties
- This power derives from the court's inherent equitable jurisdiction

Requirements

- P must provide:
  - Details of the judgment or the un-litigated cause of action on which the application is based (amount of claim)
  - Details of the nature and value of assets to be the subject of the order

- UCPR 25.11
    - P must show that the order is necessary to prevent the frustration or inhibition of the court's processes.
    - This can be done by demonstrating that there is a danger that judgement may not be satisfied.
    - The risk f dissipation must be established by evidence and not mere assertion – *Severstal Export GmbH v Bushan*
- P must show they have a good arguable case – UCPR r 25.14(1)(b)
- An applicant for an *ex parte* freezing order is under a duty to disclose all material facts to the court (identity of any affected person; any possible defence)
- P must give the 'usual undertaking as to damages' – UCPR 25.8

Jackson v Sterling Industries Ltd (1987) BK 176
Facts: the appellant was ordered by the Federal Court to provide security of $3M to Fed Ct. the order went beyond what was permissible. Normally a party must first obtain judgment and then enforce it; here, the order should not have been made as if paying security into court (this was not merely the preservation of assets pending judgment)
Cardile v LED Builders Pty Ltd (1999) 198 CLR 380
A Mareva order restricting the activities of a third-party may be appropriate in circumstances in which: (i) the third party controls the assets of the judgment debtor; or (ii) the third party may be obliged to contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor. Connection not established between Eagle and new company in this case. 

7.2 Originating Process – Summons or Statement of Claim

CPA – S3 Definition → ***originating process*** means the process by which proceedings are commenced, and includes the process by which a cross-claim is made.

- A party may not take any step in proceedings, including any appearance in court, unless the party has filed a statement of claim or summons in the proceedings or has entered an appearance in the proceedings- UCPR 6.1
- In NSW, proceedings are commenced by either a summons or a statement of claim (UCPR r6.2). The date of filing the originating process is conclusive for the purposes of any limitation defences.

7.2.1 Statement of Claim → where proceedings involve disputed contentions of fact

- Initiates pre-trial and trial processes to determine the dispute (e.g., for tort, debt, property)
- Must include court, parties (names, addresses, contact details), type of claim (e.g. torts - negligence), relief claimed (e.g. damages, interest, costs), pleadings and particulars, plaintiff's legal representative and their contact details.
- Must contain notice to defendant telling them if they don't file a defence within 28 days of being served then they will be found in default in the proceeding and judge may enter judgment against they without any further notice
- UCPR r6.3 prescribes proceedings where a statement of claim must be used

How can a defendant respond to a statement of claim?

- Statement of claim must notify the defendant of how he or she can respond
- Can respond by:
    - Filling a defence or cross-claim if they intend to dispute the claim
    - If money is claimed and D believes they owe the money claimed, they can pay the plaintiff all of the money and interest claimed
    - If money is claimed and D believe they owe part of the money claimed, they can pay that part and file a defence in relation to the part they don't believe they owe

7.2.2 Summons → where issue is a question of law, rather than a substantial dispute of fact (e.g. Anton Pillar Order, preliminary discovery, orders for injunction)

- Commences summary procedure, e.g. use of affidavit evidence
- Speedy determination to be made by return date on summons
- Must be used: proceedings where there is no defendant, appeal or application for leave to appeal (other than proceeding assigned to the Court of Appeal), proceedings for preliminary discovery.
- UCPR r6.4 prescribes proceedings where a summons must be used

7.2.3 Duties on Legal Representatives

Legal Profession Uniform Law Application Act 2014 **(NSW)**

- Places certain obligations on legal representatives (both solicitors and barristers)

(a) whether to make any order or direction for the management of proceedings, including: (iii) any other order of a procedural nature, and	Application for adjournment made at a very late stage. No explanation is proffered which is sufficient to explain why the application has only been lately made. Application for adjournment refused in the interest of justice.

10.3 Default Judgement

10.3.1 Default Judgement – UCPR r 16.1-16.10

- Applies to proceedings commenced by a statement of claim (UCPR r 16.1); is a judgment entered by virtue of court rules rather than one ordered by court based on evidence
  - It provides an incentive for D to file an appearance or a defence within the prescribed period of time (28 days, UCPR r 14.3)
- Entered if D is in default in the proceedings – UCPR r 16.2
  - I.e., D has failed to appear and file defences or the court orders the defence to be struck out
- The procedure for applying for a default judgement is the same for any D in default – UCPR r 16.3
- The recovery given to P on a successful application will depend on whether the claim is liquidated (UCPR r16.6) or unliquidated (UCPR r 16.7)
  - If the claim is **liquidated**, application for a default judgment is made pursuant to UCPR r 16.6, which requires an affidavit in support. In addition, an affidavit of service of the originating proves must accompany an application for a default judgement – UCPR r 16.3
  - if the claim is **unliquidated**, the defendant can file an appearance and take part in the damages assessment portion of the proceeding
    - unliquidated claims are usually case managed and directions made pursuant to s57 of the *Civil Procedure Act 2005* (NSW) which is of course subject to s56.

Liquidated claim → the amount claimed is known or can be determined by a formula or scale without recourse to assessment or opinion

Unliquidated claim → includes claim for damages and requires an assessment by the court

10.3.2 Setting Aside Default Judgment

- D may not appeal entry of a default judgment but may apply to have the default judgement set aside – UCPR r36.16(2)
- Default judgement may be set aside if D can provide a satisfactory explanation for the delay or show that a defence has merit where the defence has been filed but struck out – *Dunwoodie v Teachers Mutual Bank Ltd*
- *National Australia Bank Ltd v McCann (No 2)* [2010] NSWSC 1032 → failed on 3rd application to set aside default judgment → application on abuse of process.

Dunwoodie v Teachers Mutual Bank Ltd [2014] NSWCA 24

Facts: *a default judgement may be set aside if D can provide a satisfactory explanation for the delay and who that a defence has merit*

- TMB had a policy to cash checks even if the money was not in the account. D withdrew money from his bank account when he was being blackmailed by a bikie gang, which caused his account to be overdrawn.
- TMB issued a statement of claim for the money owing and obtained a default judgement as D did not respond within 28 days according to UCPR rr16.2 and 16.3.
- D sought to have it set aside, on the basis of fraud and duress; and alternatively, on the basis that TMB's contract with account holders which permitted an account holder to draw against uncleared funds was unjust.
- D's claims failed and D appealed.

Held: Fraud and duress defences were not arguable because there was no suggestion that TMB knew of either the fraud or the duress; however, the Contracts Review Act defence arguable. → matters remitted to DC to hear and decide

- It was possible for general banking terms and conditions to be an unjust provision of credit under the NSW Contracts Review Act; and delay may not be big issue when focusing on principle of justice.

16.1 Application of Part

This Part applies to proceedings commenced by statement of claim.

16.2 Definition of "in default"

(1) A defendant is in default for the purposes of this Part:
  (a) if the defendant fails to file a defence within the time limited by rule 14.3 (1) or within such further time as the court allows, or
  (b) if the defendant fails to file any affidavit verifying his or her defence in accordance with any requirement of these rules, or
  (c) if, the defendant having duly filed a defence, the court orders the defence to be struck out.

(2) Despite subrule (1), a defendant is not in default if the defendant:
  (a) has made a payment towards a liquidated claim under rule 6.17, or

10.4 Summary Judgement

Summary Judgement – UCPR 13.1

- P can apply for summary judgment against D under UCPR r 13.1
- Allows for judgment to be entered in favour of P where there is no valid defence to P's claim contained in a filed defence or where the only defence is to the amount to damages
- Application for summary judgment can be made as to the whole of a claim or any part of a claim
- Application must include affidavit evidence given by P or some reasonable person of a belief (as distinguished from opinion) that the grounds for summary judgment are satisfied – UCPR r 13.1
- D may apply to have a summary judgment set aside – UCPR rr 36.15 and 36.16

An order for summary judgement deprives a party of its hearing on the merits. Proceedings may not be summarily dismissed unless a claim or defence can properly be described as "*so obviously untenable that it cannot possibly succeed*", "*manifestly groundless*" or "*so manifestly faulty that it does not admit of argument*".

Cosmos E-C Commerce v Bidwell & Assocs Pty Ltd [2005] NSWCA 81

Facts: B provided consulting services for C. B was never paid, and sought damages in court. The court made a number of interlocutory judgments against C, including striking out C's defence and entering a summary judgment.

- this was made on the basis that C only raised a general issue and didn't set out actual matters which C meant to rely on – C merely said that it has no knowledge of these services and wasn't aware of any agreement or with whom exactly (it later sought to amend the defence)
- C now seeks to have these judgments set aside

Principles

1. there must be evidence of the facts on which the claim is based
2. there must be evidence of the belief that the defendant has no defence to the claim
3. if those two requirements are established, then the court has discretion as to whether or not to exercise the power conferred by the rule (the evidence is not so clear and definite as to justify summary intervention)

- **in regard to the triable issues arguments:**
  - The previous authorities repeatedly state that the discretion to enter a summary judgment should be exercised with extreme caution. It should only be exercised when it is absolutely certain and clear that there are no triable issues.
  - In the present case, that standard is simply not met. There was sufficient uncertainty as to the existence and form of the agreement, whether it was breached and who exactly was involved.
  - The "explanatory notes" are simply not unequivocal proof of those things – they are an internal "draft" document, which may express one person's belief as opposed to the actual state of affairs.
- **in regard to the "evidence of belief"**
  - The "evidence of belief" does not need to be express – it can be inferred from the affidavit. The trial judge did not error on this ground.

➔ Because there were triable issues, the appeal is allowed, and the summary judgment is set aside.

UCPR

13.1 Summary judgment

(1) If, on application by the plaintiff in relation to the plaintiff's claim for relief or any part of the plaintiff's claim for relief:

(a) there is evidence of the facts on which the claim or part of the claim is based, and

(b) there is evidence, given by the plaintiff or by some responsible person, that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part of the claim, or no defence except as to the amount of any damages claimed,

the court may give such judgment for the plaintiff, or make such order on the claim or that part of the claim, as the case requires.

(2) Without limiting subrule (1), the court may give judgment for the plaintiff for damages to be assessed.

(3) In this rule, a reference to damages includes a reference to the value of goods.

36.15 General power to set aside judgment or order

(1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.

(2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent.

36.16 Further power to set aside or vary judgment or order

(1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.

(2) The court may set aside or vary a judgment or order after it has been entered if:

(a) it is a default judgment (other than a default judgment given in open court), or

(b) it has been given or made in the absence of a party, whether or not the absent party had notice of the relevant hearing or of the application for the judgment or order, or

(c) in the case of proceedings for possession of land, it has been given or made in the absence of a person whom the court has ordered to be added as a defendant, whether or not the absent person had notice of the relevant hearing or of the application for the judgment or order.