

RCD Problem Framework

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JURISDICTION

Supreme Court of NSW	Unlimited civil jurisdiction Common law division – over \$750,000 Court of Appeal hears appeals in civil matters from Supreme Court, District and Land & Environment Court Operates under the <i>Supreme Court Act 1970 NSW</i> and the <i>Civil Procedure Act 2005 NSW</i>
District Court of NSW	Civil jurisdiction – jurisdictional limit of \$750,000 Court can deal with larger amounts if parties agree Unlimited jurisdiction in claims for damages for personal injuries arising from motor vehicle accident or work injury
Local Court of NSW	Operates under the <i>Local Courts Act 2007 NSW</i> Small claims division – claims up to \$10,000 General Division – claims between \$10,000 and \$100,000 Jurisdictional limit of \$60,000 for personal injury or death claims (<i>s 29 LCA</i>)

CASE MANAGEMENT

STEP 0. When exercising any power, a court is required to give effect to the **overriding purpose to facilitate the “just, quick and cheap” resolution of the real issues in the proceedings.** (s56 CPA, ss 57-60 CPA)

Parties have a statutory duty to assist the court to further this overriding purpose.

STEP 1. What kinds of DIRECTIONS/ORDERS can the court make for case management?

1. Directions as to practice and procedure generally

- a. **The court may make directions as it thinks fit for the speedy determination of the real issues between the parties to the proceedings – s 61(1) CPA**

- i. This includes directing the parties – *s 61(2)*:
- to take **specified steps** in relation to the proceedings
 - as to the **time** within which specified steps in the proceedings must be completed
 - any other orders** that the court considers is **appropriate**

- b. If a party to whom a direction has been given then fails to comply with the direction, the court may:

- Dismiss** the proceedings, in whole or in part – *s 61(3)(a)*
- Strike out** or limit any claim made by the P – *s 61(3)(b)*
- Strike out any defence filed by a D, and give judgment according – *s 61(3)(c)*
- Strike out or amend any document filed by the party, either in whole or in part – *s 61(3)(d)*
- Strike out, disallow or reject any evidence that the party has adduced or seeks to adduce – *s 61(3)(e)*
- Direct the party to pay the whole or part of the costs of another party – *s 61(3)(f)*
 - Make any other order or give such other direction as it thinks fit – *s 61(3)(g)*

2. Directions as to conduct of a hearing

a. **The court may make directions as to the conduct of any hearing, including as to limitations of time – s 62(1)**

ii. This includes making directions: - s 62(3)

1. As to the time that may be taken in the examination, cross-examination or re-examination of a witness
2. Limiting the number of witnesses, including expert, that a party may call
3. Limiting the number of documents that a party may tender in evidence
4. Limiting the time that may be taken in making any oral submissions
5. Direction that all or any part of the submissions be in writing
6. Limiting the time that may be taken by a party in presenting his or her case
7. Limiting the time that may be taken by the hearing

b. However, a direction under this section **must not detract from the principle that each party is entitled to a fair hearing and must be given a reasonable opportunity to lead evidence, make submissions, present a case and to cross-examine – s 62(4)**

c. In deciding whether to make a direction under this section, the court may have regard to the matters under s 62(5)

- iii. The subject matter and complexity/simplicity of case
- iv. No. of witnesses to be called
- v. Volume and character of the evidence to be led
- vi. Need to place a reasonable time limit on the time allowed for any hearing
- vii. The efficient administration of the court lists
- viii. Interests of parties to other proceedings before court
- ix. Costs that are likely to be incurred vs. quantum of the subject-matter in dispute
- x. Estimated length of hearing

3. Directions with respect to procedural irregularities

a. **Failure to comply** with any requirement of the CPA or of the rules, whether in respect of time, place, manner, form or content or in any other respect shall be treated as an irregularity – s 63

b. The court may do either or both of the following

- i. May make an order setting aside the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings either wholly or in part – s 63(3)(a)
- ii. May exercise its powers to allow amendments and to make orders dealing with the proceedings generally – s 63(3)(b)

c. The court may not take action of the kind referred to in s 63(3)(a) on the application of any party unless the application is made within a reasonable time and, in any case, before the party takes any fresh step in the proceedings after becoming aware of the failure – s 63(4)

4. Broad power generally under UCPR

a. UCPR r 2.1 – gives **wide general power** to give such directions and orders “**as appear convenient**, whether or not inconsistent with these rules or any other rules of court” for the **just, quick and cheap disposal of proceedings** – different from s 61(1) in two respects – McGuirk v UNSW

- i. Power **not confined to making directions for 'speedy determination' of real issues** in the proceedings, but includes a power to make directions or orders as appear **convenient for the just, cheap and quick disposal** of the proceedings; and
- ii. The power is to give directions or orders 'for the conduct of any proceedings'

STEP 2. Has the court CONSIDERED EVERYTHING they need to consider in making the direction or order for the management of proceedings?

1. Procedural directions must be directed in accordance with the **dictates of justice** - *s 58 CPA*
2. Must balance the **dictates of justice** against the need to keep **proportionate costs** and **eliminating delay** *Dennis v Australian Broadcasting Corp.*^[11]
3. In deciding what are the dictates of justice, the court **must** have regard to the provisions of *ss 56 and 57* as required by *s 58(2)(a)* (**so court/judge needs to mention their weighting in their decision**) and **may** have regard to a number of other factors set out in *s 58(2)(b)* - *Hans Pet Constructions Pty Ltd v Cassar*

- a. *s 56* - court to facilitate 'the **just, quick and cheap resolution of the real issues** in the proceedings'
- b. *s 57* - proceedings in any court are to be managed having regard to the following objects
 - i. The **just determination** of the proceedings,
 - ii. The **efficient disposal of the business of the court**,
 - iii. The efficient use of available judicial and administrative **resources**,
 - iv. The **timely** disposal of the proceedings, and all other proceedings in the court, at a **cost affordable** by the respective parties
- c. *s 58(2)(b) (discretionary considerations)*
 - i. Degree of difficulty or complexity of issues
 - ii. Degree of expedition with which the parties have approached the proceedings + how timely they have been with their interlocutory activities
 - iii. Degree of lack of expedition from circumstances beyond the control of both parties
 - iv. Degree to which the respective parties have fulfilled their duties under s 56(3)
 - v. Use of opportunities other than the court
 - vi. Degree of injustice that would be suffered by the respective parties as a consequence of any order/direction
 - vii. Such other matters as the court thinks relevant

4. **"Just resolution/determination" is still paramount but to be understood in light of the purposes and objectives stated.**
 - a. Therefore, **not just about achieving a 'just outcome' - speed and efficiency, in the sense of minimum delay and expense** - *Aon Risk*. Therefore, avoid indulgence (see below)
5. When considering **overriding purposes** in general:
 - a. When a party has had a **sufficient opportunity to plead its case**, it **may be necessary** for the court to make a **decision which may produce a sense of injustice in that party for the sake of doing justice to the opponent and litigant** - what is seen as doing justice to one party is the imposition of costs and delay to another party - *Aon Risk*
 - b. There is **no right to an indulgence (e.g. amendments of pleadings or adjournments)**
 - i. Equally, not all indulgences must be refused as the courts have to weigh the justice of the situation - if party seeking indulgence, an explanation for why an indulgence is needed is very important

- ii. A costs order is not always sufficient to overcome the injustice suffered by the other party from a party seeking an indulgence – *Aon Risk*
- c. Pursuit of **interlocutory proceedings (interim relief – injunction, discovery)** does not in any way fulfil the overriding purpose of the CPA and should be avoided as it does not go to **real issues in dispute** – *Expense Reduction*

STEP 3. Duty of the PARTIES and LAWYER to further the overriding purpose

1. A party is under a **duty to assist the court to further the overriding purpose** and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court - *s 56(3)*
 - a. Seek to **avoid technical disputes about non-essential issues** - *Expense Reduction*
 - b. Avoid **interlocutory issues, as far as possible**, without Court - *Tugrul v Tarrant*
2. **Solicitors/barristers OR any person with a relevant interest in the proceedings (see 4 in this step)** must not, by their conduct, cause a party to a dispute to be put in breach of a duty identified in subsection 3 - *s 56(4)*
 - a. Seek to **avoid technical disputes about non-essential issues** - *Expense Reduction*
 - b. Avoid **interlocutory issues, as far as possible**, without Court - *Tugrul v Tarrant*
 - c. The requirements of the overriding purpose are reinforced by the duty to the court and the administration of justice
 - i. Must act independently to avoid personal bias and not act as mere mouthpiece for the client *r 3 of the Solicitors' Rules*
 - ii. Must exercise the forensic judgments called for during the case - *r 17*
3. The court may take into account any failure to comply with subsections 3 and 4 in exercising a **discretion with respect to costs** - *s 56(5)*
4. A person has a **relevant interest in the proceedings if** - *s 56(6)*
 - a. They provide **financial assistance** or other assistance to any party to the proceedings;
 - b. Exercises any **direct or indirect control**, or any **influence**, over the conduct of the proceedings or the conduct of a party in respect of the proceedings

STEP 4 (ONLY IF IN SC). Are we in the Common Law Division of the Supreme Court? If yes, PARTIES need to comply with Practice Note SC CL 5

1. At the same time as filing the originating process, P must file **General Case Management (GCM) documents** no later than one month before the first directions hearing – at the minimum, provide a “**concise narrative of the facts** the party intends to prove on the issue of liability, so drafted as to expose the specific matters of fact, but not law, upon which liability is likely to depend”
2. Before the first directions hearing, parties are expected to have:
 - a. Discussed the case to narrow the issues and identify any matters of agreement
 - b. Agreed on suitable interlocutory orders, directions or arrangements
 - c. Prepared a draft timetable for the future management of the proceedings
 - d. Prepared draft short minutes of any orders or directions to be sought at the directions hearing
 - e. Discussed the possibility of settling the dispute by ADR
3. At the directions hearing, the judge/registrar manages how the case will proceed
 - a. The P at the first directions hearing is to provide each party with an evidentiary statement and within 28 days
 - b. The D is to serve on the P a concise statement of issues in dispute and an indication of the parts of the evidentiary statement the D requires to be given orally
 - c. Then within 14 days of receipt of the statement of issues, the P must provide a statement identifying issues that are agreed or not agreed

COSTS

Note: SP = successful party; UP = unsuccessful party, Indemnify = compensate for loss, Ordinary = party/party, usually 50% of solicitor/client costs, impropriety = improper behaviour

STEP 1. Court's POWER to order costs

1. **Costs are at the discretion of the courts** - *CPA s 98(1)*
2. Generally, costs follow the event *UCPR 42.1*
3. Court can order **ordinary costs** and **indemnity costs** - *CPA s98(1)(c)*. **Costs are to paid on an ordinary basis unless the court orders or the rules in the other steps apply** (*UCPR 42.2*)
 - a. **Ordinary basis:** usually orders a party to **partly** indemnify the recipient against the costs that the recipient owes their solicitor (*r 42.2*)
 - b. **Indemnity basis (more generous):** orders for all costs incurred except those that appear to have been unreasonably incurred, or those that appear to be an unreasonable amount (*r 42.5*)
4. However, this discretion must be **exercised on a principled basis** (*Baulderstone*) and in accordance with the principles of proportionality - *CPA s 60, Zanella v Madden*
5. **Note: Courts consider s 56** in determining costs:

- a. **Parties** have a duty to help courts facilitate just, quick and cheap resolution of the real issues in the proceedings - *s 56(3)*
- b. **Legal practitioners** have duty not to cause client to breach the client's duty to assist the courts - *s 56(4)*
- c. **The court can take into account any failure of these duties by legal practitioners when determining cost orders** - *s 56(5)*

STEP 2. Is the SP SEEKING COSTS from UP?

1. **Party/party costs (ordinary costs) - can SP get ordinary costs?**
 - a. **Apportionment** - SP may only get a proportion of its costs if the UP is able to identify clearly dominant or separate issues lost by the SP - therefore, SP will only get proportion of costs for those issues which they won (*Baulderstone*)
 - i. **Note:** UP may be ordered to pay the entirety of the costs of a SP, **even if the SP did not succeed on all issues** (*Baulderstone*)
 - b. **Multiple successful parties** - A court will normally not allow more than **one set of costs payable to parties** unless there is a conflict of interest between them in the presentation of cases. (*Baulderstone*).
 - c. **Interest** - the court may also order the payment of interest on the costs awarded as payable from the date on which the cost in question were paid - *CPA s 101(4)*
2. **Indemnity costs - can SP get indemnity costs?**
 - a. Court has power to order indemnity costs - *CPA s98(1)(c); UCPR r 42.5*
 - i. The discretion, although absolute, must be exercised judicially and be the subject of careful reasoning, as the courts should exercise caution in making such an award (*Baulderstone*)
 - b. **Requirements for getting an indemnity cost order** (*Colgate v Cussons*)
 - i. **Relevant delinquency;** or
 - E.g. **prolonging proceedings** by litigating issues which were known to be not to be real issues in breach of *s 56 CPA* is capable of constituting relevant delinquency (*Baulderstone*)
 - ii. **Abuse of process;** or

- E.g. commencing litigation in wilful disregard of facts may be relevant delinquency (*Colgate v Cussons*)
 - iii. **Ulterior purpose**; or
 - iv. **Unreasonableness**; or
 - v. **Offers of compromise and Calderbank letters**
 - Most common basis for seeking indemnity cost orders
- c. **Note: section 56(5) CPA expands the circumstances in which an indemnity cost order may be made**

- d. **Parties** have a duty to help courts facilitate just, quick and cheap resolution of the real issues in the proceedings - *s 56(3)*
- e. **Legal practitioners** have duty not to cause client to breach the client's duty to assist the courts - *s 56(4)*
- f. **The court can take into account any failure of these duties by legal practitioners when determining cost orders - *s 56(5)***

- d. **Irrelevant factors** (i.e. stuff court does not care about when assessing whether to exercise discretion to order indemnity costs) (*Baulderstone*):
 - i. **Difficulty of the litigation itself** - as courts are constantly engaged in complex litigation
 - ii. Fact that a party **fighters the proceedings fiercely and leaves no stone unturned**
 - iii. **Mere fact that a case has been found to lack merit** - most litigation that comes to an end has one party's whose case lacked merit

STEP 3. Is the court seeking to order COSTS AGAINST LEGAL PRACTITIONER personally?

1. Has the cost been incurred because the legal practitioner acted without reasonable prospects of success?

- a. Before filing a pleading, the legal practitioner must certify that the claim or defence has "**reasonable prospects of success**" - *schedule 2, cl 2 of the LPUL Application Act (NSW)*
 - i. **Without reasonable prospects of success means so lacking in merit or substance as to be not fairly arguable.** (*Treadwell v Hickey*)
 - 1. Note that if elements of the original pleaded case are abandoned, this doesn't mean that there was never reasonable prospects of success
 - ii. A finding under this provision is not to be treated lightly - **high threshold** question (*Treadwell v Hickey*)
- b. If the legal practitioner has commenced proceedings without reasonable prospects of success, the court may make either or both of the following orders in respect of the legal practitioner - *sch 2, cl 5 LPUL Application Act (NSW)*:
 - iii. An order directing the practice or associate to **repay to the party to whom the services were provided the whole or any part** of the costs that the party has been ordered to pay to any other party;
 - iv. An order directing the practice or associate to **indemnify any party other than the party to whom the services were provided against the whole or any part** of the costs payable by the **party indemnified**
- c. The **onus of showing facts provided reasonable prospects of success**

- i. There is a **presumption that legal services provided were provided without reasonable prospects of success if the court finds** that evidence does not form a reasonable basis for reasonable prospects of success:
 1. **Trial Court:** *sch 2, cl 6(1) LPUL Application Act (NSW)*
 2. **Supreme Court** *sch 2 cl 6(2) LPUL Application Act 2014 (NSW)*
- ii. This is rebuttable and **person seeking to rebut bears onus** of establishing that at the time legal services were provided, *sch 2 cl 6(3) LPUL Act 2014 (NSW)*

2. Has the cost been incurred by reason of serious neglect, incompetence or impropriety?

- a. Court has power to order costs against a legal practitioner if the costs have been incurred if there has been (*s 99 CPA*):
 - i. **Serious neglect, serious incompetence or serious misconduct of a legal practitioner - *s 99(1)(a)***; or
 - ii. **Impropriety (improper behaviour), or without reasonable cause, in circumstances for which a legal practitioner is responsible - *s 99(1)(b)***
 - **'Improper'**: Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion (*Ridehalgh as endorsed in Treadwell v Hickey*)
 - **'Unreasonable'**: Conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive (*Ridehalgh as endorsed in Treadwell v Hickey*)
- b. **Note that a finding under this provision is not to be treated lightly - high threshold** - not enough simply to question the actions taken and beliefs held by the lawyer - the evidentiary burden must be satisfied (*Treadwell v Hickey*)
- c. After giving the legal practitioner a **reasonable opportunity to be heard**, the court may do any one or more of the following:
 - i. Disallow the whole or any part of the costs in the proceedings (**stop a party from having to pay**) *s 99(2)(a)*:
 - **Barrister**: between barrister and solicitor or barrister and client
 - **Solicitor**: between solicitor and client
 - ii. **Direct the legal practitioner *s 99(2)(b)***:
 - **Barrister**: to pay to the instructing solicitor or client, or both, the whole or any part of any costs that have been ordered to pay to any other person
 - **Solicitor**: to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person
 - iii. **Order the legal practitioner to indemnify any party (other than the client) against costs payable to that party - *s 99(2)(c)***
- d. **If the legal practitioner failed to assist the court, courts may take this into account.**
 - i. Legal practitioner must not conduct him/herself so as to cause his or her client to breach the client's duty to **assist the court** - *s 56(4) CPA*
 - ii. If failed to comply, court can take this into account with exercising discretion with respect to *s 99 costs - s 56(5) CPA*
- e. **Guiding principles** which the court will take into consideration (*Treadwell v Hickey*):
 - i. Must exercise this discretion "**with care and discretion** and only in clear cases"

- ii. A legal practitioner is **not to be held to have acted improperly, unreasonably or negligently** simply because he or she acts for a party who pursues or a defence which is **plainly doomed to fail**
- iii. Legal practitioner is **not the judge of the credibility of the witness or the validity of the arguments**
- iv. Can only make orders when, with all allowances made, a legal practitioner's conduct of court proceedings is **quite plainly unjustifiable** can it be appropriate to make a wasted costs order
- v. Legal practitioner must have **full and sufficient notice of the costs claim**
- vi. Where legal practitioner's ability to rebut the complaint is hampered by the duty of confidentiality to the client, he or she should be given **benefit of the doubt**
- f. **If in SUPREME COURT- court has to follow procedure in order to make a costs order against a legal practitioner personally - Practice Note SC Gen 5 SC:**
 - i. **Must give practitioner opportunity to show cause why costs should not be ordered against him or her**
 - ii. This can be done orally at the conclusion of the trial, on application or any other appearance before the court
 - iii. Court may adjourn the matter to another day and may direct practitioner to provide written submissions
 - iv. Court may also ask other parties to the proceeding to make submissions if it assists the courts
 - v. If a practitioner informs the court that he has requested his client to waive CLP in a respect which the practitioner asserts is relevant to the court's consideration of the costs order, the court will invite the client to make submissions on the matter and to indicate whether the client wishes an order to be made against the practitioner
 - vi. Upon determination by the court that a legal practitioner shall be personally liable for the costs of a party to the proceedings or any part therefore and such costs are ordered to be payable forthwith, the court may order that a bill of costs relevant to the costs order be filed with the court and served on the party liable to pay within such time as the court orders and that such a bill of costs be in the form prescribed
 - vii. The judge may determine and order the amount of costs payable under the costs order

STEP 4. General principles of costs/reasons why Court's orders may be invalid (i.e. defences against cost orders)

1. **Proportionality of costs** - the cost to the parties must be **proportionate to the importance and complexity** of the subject-matter in dispute - *CPA s 60*
 - a. This can influence the procedural demands that the court places on the parties (*Zanella v Madden; Vella v Australia & New Zealand Banking Group*)
 - i. In *Zanella v Madden* (2007), an order was sought to declare that another joint tenant was dead so that it a manager could be appointed. The **defendant was missing** since 1980, the **interest in property is worth \$37,500** and **online searches showed no signs** of the defendant. **The court held that there is a need to give effect to section 56 (overriding purpose)** and given the (i) alcoholic history, (ii) age and (iii) length of time missing, the person is **on the balance of probabilities dead**.
 1. Advertisements could be made in Scotland from where the person came, but **to put up advertisements could be disproportionate to his share in the estate** (*Zanella v Madden*)
 - ii. E.g. "Bearing in mind the provisions of ss 56-60 of the CPA, the court **will not interrupt the trial to deal with late subpoenas or notices to produce. To do otherwise would cause large expenses to innocent parties in the proceedings**" unless the situation arose by surprise" (*Vella v ANZ*)
2. **Purpose of costs** - is **only intended to compensate the SP and is NOT intended to punish**

- a. However, can be used as an **encouragement** to get parties to **comply** with rules, judgment or court order - UCPR r 42.10
- b. E.g. Dr Bronte Douglass v Lawton: in a hearing which was taking a long time, the appellant wanted to amend their pleadings or adjourn the matter. The trial judge, in pretty explicit language, said that appellants will get a very 'nasty' costs order if they want to continue with the application. The appellants said that the language indicated that the costs order was 'punitive', which is not permitted.
 - i. **Held:** whilst the choice of language was bad, the order is not really punitive and not prohibited. It was used as an encouragement to comply with procedure, because the amendment would lead to a lot of delay because of extra witnesses and the time taken to discuss the application already

STEP 5. Other specific costs orders

1. **No order as to costs** - where court indicates that each pays their own - usually where proceedings are determined without a hearing on the merits
2. **Costs of the day** - can include the costs for work 'reasonably connected' with the issues dealt with on that day
3. **Costs in any event** - costs of interlocutory application - indicates that the party who is ordered to pay the costs is responsible for those costs irrespective of the outcome of the proceedings where, without another specific order, costs would follow the event
4. **Costs in the cause** - usually concerns the costs of interlocutory application - who should pay the costs of the application is not determined at the time of the application - this means that the party that will ultimately be liable for the costs (usually the UP) will have to pay the costs of that interlocutory application as well

STEP 6. COSTS AGAINST THIRD PARTIES^{SEP}

1. **Prima facie, costs orders are only made against a party to the litigation.** (Macquarie Health v Sydney South West Health)
 - a. Costs orders only made against non-parties in exceptional circumstances. (Macquarie Health v Sydney South West Health)