HD APPROVED

CIVIL PROCEDURE & DISPUTE RESOLUTION MLL391

COMPREHENSIVE NOTES

-UPDATED FOR 2022-

TOPIC PAGE

1 | CIVIL JUSTICE SYSTEM: OVERVIEW

Poyser v Minors (1881) 7 QBD 329 at 333:

> *'practice' … like 'procedure' denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right … the machinery as distinct from its product'*

BASIC LITIGATION PROCESS

Why is civil procedure important?

- Bar exam
- Strategic value add for client
- 'real lawyering'
- pathway to remedy

VICT v MUA & CFMEU [2017] VSC 762

- VICT union picket; Tort claim; Injunction; Individuals added; Substituted service

Matthews v AusNet (No 46) [2017] VSC 360

- *Carol Ann Matthews v AusNet Electricity Services Pty Ltd*, S CI 2009 4788 — Black Saturday Bushfire Class Action
- Maurice Blackburn was instructed in a class action on behalf of those who suffered injury, **loss or damage** as a result of the Kilmore East - Kinglake Black Saturday bushfire of 7 February 2009. The bushfire resulted in 119 deaths, the destruction of 1,242 homes, damage to a further 1,084 homes, and the burning of over 125,000 hectares of land.
- The parties to the Kilmore East Kinglake Black Saturday bushfire **class action** agreed to settle on 15 July 2014, after more than 200 court sitting days before Justice J Forrest.
- Negligence claim
- Original writ filed on 16 February 2009
- Amended writ filed in August 2010
- Settlement reached in July 2014 — On 15 July 2014, after a 16-month trial against SP AusNet and four other defendants, the plaintiffs and the defendants reached an agreement to settle the class action for a record settlement of more than $494 million dollars.

Bauer Media v Wilson (No 2) [2018] VSCA 154

- Rebel Wilson defamation claim
- Won at first instance
- Lost on appeal
- Costs orders

MECHANISMS OF CIVIL PROCEDURE

The principles of Civil Procedure are mostly embodied in the relevant rules of each court, each court within the Australian Court hierarchy having developed rules governing its procedure. For instance:

- the Supreme court has an inherent (permanent) jurisdiction to govern its own processes.
- the Magistrates, County and Supreme courts all have their own procedural rules.

In this unit we will focus on the ***Supreme Court (General Civil Procedure) Rules 2015*** **(Vic)**. The Rules of the Magistrates Court Rules and the County Court Rules are, however, similar to the Supreme Court Rules.

The source of these Supreme Court Rules is ***the Supreme Court Act 1986*** **(Vic)**.

However, the Supreme Court has also **"inherent jurisdiction**" so it can regulate its own procedures.

Supreme Court (General Civil Procedure) Rules 2015 (Vic)

- Inherent jurisdiction of the VSC = *Supreme Court Act 1986* (Vic) **s 25**
- How rules are interpreted / applied = **Order 1 rule 14** of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).
- Recent amendments (x 19 since 1st edition of textbook)

> **1.14.1 Exercise of powers of Registrar by Associate Judge**
>
> Any Associate Judge may exercise any power or authority conferred on the Registrar by or under these Rules.

Note: Supreme Court also has inherent jurisdiction to make its own rules from time to time which govern a particular situation

- Provides Supreme Court with such power as is necessary to ensure its processes and procedures are capable of producing just outcomes
- Purpose of inherent jurisdiction is to allow courts to regulate their processes to prevent abuse of process

CIVIL JUSTICE SYSTEM

In Australia, the "traditional adversarial trial system" applies. However, as we have seen, this system has been impacted as a result of the enactment of the ***Civil Procedure Act 2010*** **(Vic)**.

Goals of civil justice system:

TRADITIONAL ADVERSARIAL SYSTEM

- Party **autonomy and control** + **Zealous advocacy** with **minimal cooperation**
  - Preparation and presentation of a case was left entirely at the hand of the parties and/or their lawyers at their own pace.
  - Parties decided the issues for court to determine
    - Could not raise an issue that wasn't pleaded by a party: *Fookes v Slaytor*: Contributory negligence not pleaded

- Parties decided how and what evidence was presented
- **Parties themselves managed all the pre-trial preparation (investigation and evidence-gathering) and decided the speed at which case progressed to trial as self-interested tactical moves**

- **Passive role** of Judge / Court
  - **Only determined the issues the parties chose to bring before them** with regard to the evidence submitted to them
  - No control over the issues to be tried
  - No control as to how the case was prepared or presented (i.e. pre-trial preparation)
  - Judges cannot enter into the arena of dispute
    - Might create impression of partiality or bias
      - *Hoare Bros Pty Ltd v Magistrates' Court of Victoria*: Judge asked leading questions to remedy deficiencies in prosecution case
    - Parties ask questions in turn and judge is forbidden to call witnesses or examine them
      - *Jones v National Coal Board*: Only to clear up points, keep to rules, exclude irrelevancies, discourage repetition, ensure he follows the points and can assess the truth
- Increased **delay and costs**
  - Policy of doing justice on the merits
  - Priority on doing justice according to the merits
  - Procedural rules of secondary importance
  - If there was non-compliance with the rules, judges were prepared to forgive that to decide a case on its merits
    - Parties were free to concede each other extra time
- **Primacy of pleadings**
- **Adjournments and amendments common** (rectified by costs)
- Sanctions on non-compliance were **only** imposed if and when the non-delinquent party made **application**
- Not meeting **r 1.14** – endeavouring to ensure proceeding is effectively, completely, promptly and economically determined.

Examples of 'old school' view of CP

Jones v National Coal Board (1957)

- Coal miner killed when section of roof caved in. Widow brought negligence claim for damages against Board. Frequent intervention by trial judge criticized on appeal
- Retrial ordered

Held - *Lord Justice Denning* said:

- judge must decide case on evidence that parties themselves have adduced - cant ask to adduce a witness
- judge not to be involved in conflict
- court must ignore any issue not brought before the court even where it may have an adverse effect on the courts findings
- The interventions (that the judge asked too many questions) taken together **were far more than they should have been.** In the system of trial which we have evolved in this country, **the judge sits to hear and determine the issues raised by the parties NOT to conduct an investigation or examination on behalf of society at large**. The judge's objective is to find out the truth and to do justice according to law. Justice is best done by a judge who holds the balance b/w the contending parties without himself taking part

in their disputations. If a judge should himself conduct the examination of witnesses, he so to speak, descends into the arena and is likely to have his vision clouded by the dusts of conflict. Yet he **must keep his vision unclouded.**

- 'The judge's part when evidence is being given is to hearken to it, asking questions of witnesses only when it is necessary to clear up a point; to see that advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points made b the advocates and can assess their worth and at the end to make up his mind where the truth lies. Though a judge is entitled and bound to intervene at any stage of a witness's evidence to understand the nature of the evidence, such intervention should be as infrequent as possible during cross-examination, for the very gist of cross-examination lies in the unbroken sequence of question and answer.'

Fookes v Slaytor (1979)

Negligence claim — Collided with parked trailer at night in bad weather; Truck driver did not file a defence or attend trial but … Damages still reduced by 1/3 for contributory negligence – Reversed on appeal

- The plaintiff was driving his car on a dark wet winters night. The plaintiff struck a parked truck that was not lit, parked on the side of the road. He was injured and sued the owner of the truck in negligence (truck not lit).
- The defendant (truck owner) did not bother to defend the action nor attend the trial.
- At the hearing, the plaintiff gave evidence. The judge awarded the plaintiff a sum of damages but then reduced them as the plaintiff contributed to his injuries (contributory negligence).he plaintiff was aggrieved that the judge had reduced the damages. P appealed.

Held

- The issue of plaintiffs contributory negligence was not before the court – cant find contributory negligence without it being pleaded
- That the judge was wrong in reducing damages, as there was no issue before the trial judge of the plaintiff's contributory negligence.
- **All the judge had to do was decide the issues brought before the court. The issue of contributory negligence was not brought before the court.** As it was not raised, the TJ had no duty / obligation

Hoare Bros v Magistrates Court

- Farmer outside Geelong charged with offence – spraying chemicals causing damage to other property
- Magistrate asked lots of questions at the end of examination in chief of prosecution witnesses
- Magistrate prohibited from further hearing the matter on basis of apprehended bias
    - *"A trial does not involve the pursuit of truth by any means"*
    - *"… fundamental nature of the adversary system and the dangers of the judge descending into the arena"*

AON Risk Services v ANU (2009) 239 CLR 175

- January 2003 – Fire; December 2004 – Proceedings commenced; November 2006 – Application for leave to amend statement of claim — Unsatisfactory explanation for delay
- *Court Procedures Rules 2006* (ACT)
    - **r 502** At any stage in a proceeding, Court may grant leave to amend *"in the way it considers appropriate"*
    - **r 21** Rules are to be applied with objective of achieving … just resolution of real issues, timely disposal at affordable cost
- French CJ at [4]: "*the history of these proceedings reveals an unduly permissive approach to an application that was made late in the day … in such circumstances, the applicant bears a heavy burden" … "Save for the dissenting judgment of Lander J in the Court of Appeal, the history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable rules of court, leave should be granted."*

Strengths and weaknesses of the adversarial system

The traditional adversarial trial system has a number of particular features which can be readily identified:

- It is the **parties themselves who determine the track of evidence** that is presented to the court and thus it is the parties themselves who **"select" the issues to be litigated** and **upon which adjudication is sought**;
- Each party is **responsible for the investigation and the gathering of the information that is to be placed before the court**, and the way it is to be presented;

- The judge plays a comparatively **"non-interventionist role"**, and the court makes its decision based on the evidence and issues presented to it;
- The procedure is designed to **concentrate the judicial function into one continuous hearing**;
- evidence at the hearing is elicited by the parties asking questions in turn, the **judge being forbidden to call witnesses or to examine them** otherwise than for the purpose of clarifying their evidence where it is unclear; and
- Where the rules of court are not complied with, in general **no sanction will be imposed on the "delinquent" party except at the request of the "non-delinquent party"**.

But it is these features which represent the adversarial trial system **biggest disadvantages**:

- **party autonomy**, aka leaving it to the parties themselves to enforce the expeditious preparation for trial;
- as a consequence, of party autonomy, **long delays** can be experienced before a matter gets to trial;
- **leaving sanctions to the parties**: the adversary philosophy is that the courts will not impose sanctions if the rules of court are not complied with; thus, although the rules of court may impose time limits within which particular steps need to be taken, the parties are free to concede to each other extra time for the taking of these steps. The obvious consequence is that inordinate delays occur before a case finally comes to trial;
- traditionally, the adversarial model of procedure is premised on "party autonomy" or "party control": **judges play a passive role** by not intervening in the preparation or presentation of a case; and
- the costs of litigation being substantially higher than they should be.

Bearing in mind these factors, **r 1.14 of the SCR** assumes increasing importance.

MODERN CASE MANAGEMENT APPROACH: *Civil Procedure Act 2010*

- Paradigm shift in the way civil litigation is conducted by parties and managed by courts
    - Removes the progress of cases from the control of parties
    - **s 1(1)(c)** – Main purpose of Act is to provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
- CPA introduced to impose greater case management + Formally recognised case management schemes
    - Strict discipline on the conduct of civil proceedings to improve cost-efficiency of litigation
    - Authorise sanctions for non-compliance (CPA **s 51**)
    - Identification of real issues at early stage (CPA **s 50**)
    - Strict timetables
    - Efficiency now an important factor, sometimes at the **expense of justice to the parties**
- **Increasing judicial control of interlocutory steps and processes**
    - CPA seeks to introduce a range of measures designed to achieve its overarching purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute in civil matters.
- Strengthening ADR processes (underlying tenet is that courts are of last resort)
- Case management by judges and quasi-judicial officers such as Registrars remove the progress of cases from the control of the parties (or their legal representatives).
- Reforms that allow judges and the Registrar of each court to set down timetables by which particular steps have to be taken by the parties (addresses some of the disadvantages above).
- However, the situation may arise requiring documents to be amended.
    - This and other instances may prevent the timetable being followed and cause cases timetabled for a hearing to be postponed?
    - In this scenario, the High Court of Australia has **not been consistent**: *Sail v SPC*, *QLD v JL Holdings*, *AON Risk Services*

- Conduct of proceedings **now at hands of the court – judges set and enforce timetables by which the parties have to take certain steps**
    - Everyone must go to court to attend a directions hearing for the timetable
- More proactive role from the court
- Court as equitable allocator of opportunities to realise collective goals
- Litigation is not a private matter between parties but has an important public interest which is to dispose of cases early.
- Lawyers on both sides working in solidarity to achieve integrity and coherence to deliver appropriate justice

Sali v SPC – HCA held **case management principles are important** – hole precedence

- What might be perceived as an injustice to a party in the context of the one case may not be so when considered in a context which includes the claims of other parties / litigants + public interest of making the most of court research

Sali v SPC Ltd (1993) 116 ALR 625

- Court's normal practice is to meet the convenience of counsel, but it will not delay other litigants' access to the courts by putting off hearings, especially where a tactic of delay was used.
- Case management principles are superior and need to be considered in deciding whether to allow adjournment.
- If a timetable has been fixed, parties must stick to it

HCA reversed position from *Sali* –

Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146

- Ultimate aim of court is attainment of **justice** and case management cannot be allowed to supplant it.
- Held justice = paramount consideration
- Application for adjournment is not meant to punish party
- Case management, involving the efficiency of the procedures of the court, was in this case a relevant consideration, but case management should not be allowed to provide the injustice of shutting applicants out
- NB: Now overruled by Aon.

HCA reversed position from *Queensland* (aka current position) –

Established in *Aon Risk Services v Australian National University* (2009)

Note: Now embedded in the CPA **ss 47-53** which overcome the traditional adversarial system.

- High Court placed immense importance on case management principles
- Judgement of this case embodied in **s 47**
    - Held in *AON* – In the proper exercise of trial judges discretion, application for adjournemt and amendment, time of the court is publicly funded resource. Inefficiency of the use of those resources due to adjournment etc is not in public interest – in circumstances where sought and lack of explanation / reason = should not be allowed
    - We must consider the interests of justice of all litigates awaiting trial
    - What may be just when amendment is sought, required a count to be taken of other litigants, not just the parties to the proceeding in question (consistent with *Sarli v SPC*)

- Case management principles are the **paramount consideration**
- Whilst court considers justice, justice requires looking at both the merits of the case and **case management principles**. Relevant factors are:
    - Substantial delay
    - Wasted costs
    - Effect on other litigants waiting for their case to be heard
    - At what stage was the amendment sought?
    - What was the explanation for late amendment?
    - Effect on court resources
    - Nature and importance of the amendment
    - the circumstances that caused the delay
    - Merely having a good cause of action does not entitle the party to an adjournment
- Limits should be placed on re-pleading to take into consideration substantial delay and costs

- Cannot be said that a just resolution requires a party to be permitted to raise any arguable case at any point, on payment of costs

Principle of Open Justice: Order 49 SCR

- Principal has it that proceedings should generally be conducted publicly — open to the public
- Principal is subject to certain common law exceptions —
    - Court can give directions as to the order of evidence and addresses, and generally as to the conduct of the trial
    - This includes orders of suppression, withholding parties' identities etc

NOTE SS 47-49 – EFFECT ON ADVERSARIAL SYSTEM – see next pages for effect + sections

IMPACT OF THE CIVIL PROCEDURE ACT 2010 (VIC)

Civil procedure reform milestones

Johnson v Johnson (2000) 201 CLR 488 at 493

*'The rules and conventions governing [judicial] ... practice are **not frozen in time**. They develop to take account of the **exigencies of modern litigation**. At the trial level, modern judges, responding to a need for more **active case management**, **intervene** in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx'*

Second reading speech

Mr HULLS (Attorney-General) —

> *The Civil Procedure Bill 2010 will reform, **modernise and unify the procedure** for the conduct of civil litigation. Courts play an important role in adjudicating civil disputes and procedural rights and that role should, of course, continue. But as a public resource, courts must be used responsibly. Parties should not abuse their right of access to the courts by unnecessarily tying up court resources, thereby preventing others from accessing justice. A well-resourced litigant should not be able to use their power to play tactical games and draw out litigation until the other party is forced into an unfair settlement or withdraws.*
>
> *… At the core of these reforms is the concept of proportionality. Participants in litigation will be required to use reasonable endeavours to ensure that legal and other costs spent in the proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute, and the amount in dispute. The courts will also be required to deal with a civil proceeding in the same manner.*

- Court has more proactive approach
- More control over the case
- Note: if strict timetable, one party becomes aware of new facts and must amend their pleadings, they want an adjournment – problem =
    - **One hand**: **Strict timetable** – case management principles have role to play – parties required to follow strict timetables
    - **Other hand**: function of the court to **do justice** – have all disputes within the parties resolved in one hearing, do justice on the merits of the case

MECHANISMS UNDER THE CPA

OVERARCHING PURPOSE: s 7

7 Overarching purpose

(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is **to facilitate the just, efficient, timely and cost-effective resolution** of the real issues in dispute.

Purpose = To facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

- **R 1.14** SCR – let's get matters determined quickly, efficiently & economically
- **S 29** *Supreme Court Act* says the same thing
- Lawyers have a duty to the court in preparing and presenting cases in a timely way.
- Net effect of **s 7** is that a court must have regard to the most efficient, effective and cost-efficient disposition of all pre-trial issues

In the exercise and interpretation of its powers as part of inherent, implied or statutory jurisdiction or derived from CL or procedural rules: **s 8**

8 Court to give effect to overarching purpose

(1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

(2) Subsection (1) applies despite any other Act (other than the **Charter of Human Rights and Responsibilities Act 2006**) or law to the contrary.

COURT'S POWER TO FURTHER OVERARCHING PURPOSE: s 9

9 Court's powers to further the overarching purpose

(1) In making **any order or giving any direction** in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects—

(2) For the purposes of subsection (1), the court may have regard to the following matters—

(e) the degree to which each person to whom the overarching obligations apply has **complied with the overarching obligations** in relation to the proceeding;

OVERARCHING OBLIGATIONS: ss 16-27

Failure to comply with pre-trial directions is a breach: *Eaton v ISS Catering Services Pty Ltd*

- Apply to lawyers, clients, clients' lawyers, clients' legal practice, experts, and others who have an interest in litigation (**s 10**)
- **Obligations in s 16-27 are intended to create a model standard for conduct of parties.**
    - Impose a positive set of obligations and duties on all participants.
    - Whole culture of litigation has to be changed.

Paramount duty: s 16

16 Paramount duty

Each person to whom the overarching obligations apply has a param**ount duty to the court to further the administration of justice** in relation to any civil proceeding in which that person is involved, including, but not limited to—

(a)any interlocutory application or interlocutory proceeding;

(b)any appeal from an order or a judgment in a civil proceeding;

(c)any appropriate dispute resolution undertaken in relation to a civil proceeding.

Overarching obligations: ss 17-26

Section 17: Act honestly

- Person to whom overarching obligations apply must act honestly at all times in relation to a civil dispute

Section 18: Not make a claim / defence unless it has 'proper basis'

- Person to whom overarching obligations apply must not make any claim which is **frivolous, vexatious or an abuse of process.**
- If person wants to file a claim or defence, the allegations upon which those are based must have a factual foundation
- Not a new requirement, but s 18 creates now a clear obligation on counsel and lawyers when drafting pleadings

Section 19: Reasonable belief that step necessary

- Must not take a step in connection with a dispute unless that person reasonably believes that step is necessary to facilitate the resolution or determination of the dispute.

Section 20: Cooperation

- Must cooperate with the parties to a civil proceeding.
- Must cooperate with the court in connection with the conduct of the proceeding

Section 21: Not misleading or deceptive - IMPORTANT

- **Must not engage in misleading and deceptive conduct, whether or not it was intentional.**
- Examples:
    - Withholds information or docs
    - Wastes court's time with irrelevant arguments, unmeritorious claims or tediously-worded arguments
    - One party fails to bring all authorities to attention of court or judge
    - Concealing / misleading facts
    - Knowingly permitting client to deceive court
    - Coaching or pressuring witness to give particular evidence

Section 22: Reasonable endeavours to settle – **IMPORTANT**

- Must use reasonable endeavours to resolve a dispute by agreement

Section 23: Narrow issues in dispute

Section 24: Ensure costs are reasonable and proportionate

- **Courts undertake a balancing act**
- **Look at costs incurred and the complexity and importance of the issues raised in litigation**
- Examples:
    - Employing senior QCs instead of junior lawyers
    - Large amount of material that is unnecessary and excessive provided to the court
    - Unduly technical and costly disputes about non-essential issues
    - Spending lots of money on a small claim

Section 25: Minimise delay

- Obligation to minimise delay
- Must act promptly

Section 26: Disclose existence of docs

- **Person to whom overarching obligations apply must disclose to each party the existence of all docs that are or have been in their possession that are CRITICAL.**
- **R 29.02** (this section is over and above rules of court we've looked at).
- *Hodson v Amcor Ltd* –
    - Discovery is to ensure parties to a dispute disclose to each other all relevant, non-privileged docs. Even if it can hurt the providing party's case. Ensures all parties are placed in a position to know the case they have to meet, and so Court has all the relevant evidence to achieve a just outcome.