

Table of Contents

Module 1: Introduction and Guiding Principles, Case Management and Purpose Error! Bookmark not defined.

Procedural Law..... **Error! Bookmark not defined.**

Civil Procedure Act and The Uniform Civil Procedure Rules..... **Error! Bookmark not defined.**

Module 2: Access to Justice, Open Justice and Client Care Error! Bookmark not defined.

Open Justice **Error! Bookmark not defined.**

Access to Justice **Error! Bookmark not defined.**

Pre-Litigation Steps **Error! Bookmark not defined.**

Module 3: Alternative Dispute Resolution (ADR), Jurisdiction, and Limitation Periods.....Error! Bookmark not defined.

Alternative Dispute Resolution..... **Error! Bookmark not defined.**

Jurisdiction..... **Error! Bookmark not defined.**

Module 4: Initiating Proceedings, Commencing Litigation, Joining Parties and Causes of Action, and Drafting Pleadings..... Error! Bookmark not defined.

Initiating Proceedings..... **Error! Bookmark not defined.**

Pleadings **Error! Bookmark not defined.**

Particulars **Error! Bookmark not defined.**

Joining Parties and Causes of Action **Error! Bookmark not defined.**

Module 5: Service..... Error! Bookmark not defined.

Module 6: Evidence in Proceedings..... Error! Bookmark not defined.

Forms of Evidence **Error! Bookmark not defined.**

Methods of Producing Evidence **Error! Bookmark not defined.**

Privilege..... **Error! Bookmark not defined.**

Module 7: Interlocutory Application and Injunctions Error! Bookmark not defined.

Interlocutory Application..... **Error! Bookmark not defined.**

Security for Costs..... **Error! Bookmark not defined.**

<i>Interlocutory Injunctions</i>	Error! Bookmark not defined.
<i>Mareva Orders</i>	Error! Bookmark not defined.
<i>Anton Piller Orders</i>	Error! Bookmark not defined.
Module 8: Costs and Settlement	Error! Bookmark not defined.
Module 9: Strike-out, Summary Disposal and Vexatious Litigants	Error! Bookmark not defined.
<i>Strike-out</i>	Error! Bookmark not defined.
<i>Summary Disposal</i>	Error! Bookmark not defined.
<i>Vexatious Litigants</i>	Error! Bookmark not defined.
Module 10: Enforcing Judgements	Error! Bookmark not defined.
Module 11: Appeals	Error! Bookmark not defined.

We learn about civil procedure law in the context of three themes that run through the subject:

- The overriding purpose of the *Civil Procedure Act 2005 (NSW)*, Found in section 56
- The impact that technology is having on civil legal practice
- Sometimes a lawyer's duty to the court may seem to conflict with the lawyer's duty to their client

Module 1: Introduction and Guiding Principles, Case Management and Purpose

Procedural Law

What is Procedural Law?

- Procedural law is the law that governs the conduct of proceedings before the court.
Procedural law is “rules which are directed to governing or regulating the mode or conduct of court proceedings’ (Textbook page 2)
- Sometimes described as ‘adjectival law’ – distinguishes it from substantive law
- Not concerned with the law that establishes or defines the particular right
- Procedural v Substantive Law
 - o Procedural law is distinguished from substantive law in that procedural law regulates the way in which substantive rights and obligations are claimed and enforced, without impacting on the definition of those particular substantive right
 - o Substantive law is the law that defines legal rights, duties, powers and liabilities
 - o The distinction between substantive and procedural law was stated by the majority in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503 Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [99]:

Purpose of Procedural Law

- It provides the institutions and rules which facilitate dispute resolution
- Basis of the rules lies in the need to provide procedural fairness
- Relatedly, procedural law is an important component of the idea of the rule of law
- Modern procedural law has an important role in **managing the flow and conduct of litigants**
 - o It has practical economic and bureaucratic functions which are very important in a litigious age where the costs of court action are ever-increasing
- Ensures fairness of the legal process

Significance of Procedural Law

- The rules guarantee procedural fairness, and procedural fairness is important both in its own right and through its link with substantive justice
- Jeremy Bentham
 - o Saw the rules of procedure as being central to the machinery of civil justice

- The power of procedure in the link between evidence and correct decisions

Adversarial Model

- Most common in Australia (Common Law Country) – derives from the English Common Law
- Key features
 - Determining legal disputes according to their [individual circumstances](#) and related judge-made [case law and legislation](#)
 - An [inductive form](#) of legal reasoning
 - The trial is the distinct and separate climax to the litigation process
 - Court-room practice subject to rigid rules
 - The proceedings are essentially controlled by the [parties with an emphasis on oral arguments](#)
 - Judiciary largely reactive to information
 - The expenses fall largely on the parties

Inquisitorial Model

- Origins in revolutionary France and Roman legal tradition
- Key Features:
 - Sources of law found in [authoritative statements of legal principles](#) issued by the state (EG: Civil and Criminal Codes)
 - A deductive form of reasoning
 - No rigid separation between pre-trial and trial processes
 - Procedural rules are meant to be minimal and uncomplicated
 - [Lawyers are not as central](#) to the court hearing and litigation process
 - Emphasis on written statements
 - The judiciary is proactive and inquisitorial

Managing Justice Inquiry: Australian Law Reform Commission Report 89, Managing Justice: A Review of the Federal Civil Justice System (Sydney, 2000)

- Page 10 – 12 of Textbook – Reviews Adversarial/inquisitorial legal families
- In the legal systems of today there is no pure example of either the civil law or common law system

- All relevant legal systems in the western world are to greater or lesser degrees hybrids of these two models or of other legal families
- Australia Today has more of a hybrid system

Reforms of the adversarial systems of litigation

- There has been criticism of the adversarial system model – prevents access to justice due to its cost and its delay
- Criticised for being unjust, unequal and producing inaccurate results
- This criticism led to a major review of the civil justice system in England and Wales by [Lord Woolf](#)
 - o Primary problem: It restricted access to justice
- In Aus, the criticisms resulting in the Australian Law Reform Commission conducting its own inquiry in 1999

Sources of Procedural law

- Three sources of procedural law, divided between each arm of the government
 1. The Legislature:
 - o NSW government, which creates statutes like the *Supreme Court Act 1970* (NSW) and the *Civil Procedure Act 2005* (NSW)
 - o CPA contains rules regarding the process of litigation
 - Legal costs, enforcing judgements etc.
 2. The executive
 - o EG: The *Uniform Civil Procedure Rules 2005* – made pursuant to the CPA
 - Not exhaustive in how civil litigation operation
 3. The Judiciary
 - o Through the inherent jurisdiction of superior courts, court practice notes, and judicial decisions, the courts develop their own forms of procedural law
 - o Inherent Jurisdiction
 - Allows courts ‘to properly exercise their powers, perform their functions and to control abuse of process’ [Riley McKay Pty Ltd v McKay \[1982\] 1 NSWLR 264](#)
 - Examples of devices originally derived from court’s inherent jurisdiction
 - Security for cost orders

- Asset preservation orders
- Search and Seizure orders
- Limited Jurisdiction
 - District and Local Court have a limited jurisdiction which arises expressly under statute or is derived by implication from statutory provisions conferring particular jurisdiction *Grassby v The Queen* (1989) 168 CLR 1 at 16–17
 - Where a court’s powers are defined by statute (Local and District) – “there is an implied power to do that which is required for the effective exercise of its jurisdiction” (*TKWJ V The Queen* (2002) 212 CLR 124)

Need for Change – Case Management

- *Jackamara v Karkouer* (1998) 195 CLR 516, 626-527
 - ‘Delay will almost always impede the proper disposition of any case that does not come to trial promptly. Memories fade; records may be lost
 - Delay in a case will almost always add to the costs
 - Prolongs the uncertainty
- Case management connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition
 - Where case management hold sway – law ceases to be impassive and distant

Costs

- Costs is of concern to the civil justice system – excessive costs may hamper access to justice as disputants cannot afford to commence litigation
- Cost of litigation can be employed as a tactical weapon – forcing lesser parties to discontinue proceedings
- Costs are also incurred due to the disbursements such as court fees, expert reports, witness expenses and printing fees
- Case management is one tool by which attempts to minimise costs

Managerial Judging

- Caseload management focuses on the overall caseload and seeks to distribute and direct cases through the system in an efficient manner
- Managerial judging focuses on the role of the judge in an individual case

- Requires the judge to take an active part in directing the proceedings through its interlocutory stages

Civil Procedure Act and The Uniform Civil Procedure Rules

- The CPA and the UCPR consolidated the existing provisions about civil procedure into a single Act and set of rules that apply uniformly to all three NSW courts
- The UCPR needed to be sufficiently flexible to allow for the differing requirements of the three levels of the court hierarchy

Overriding Purpose of the CPA

- The CPA and the UCPR confirm and re-enact the powers of courts to confine a case to issues genuinely in dispute and to ensure compliance with court orders, directions, rules and practices
- S 56(1) of the CPA:
 - o 'The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings
- The overriding purpose of the CPA is **not** about the court's financial decision on the substantive rights and interest in the legal dispute
- **Rather**, it is relevant to the process through which the dispute is resolved
 - o The procedural decisions of judges and the conduct of judges, parties and lawyers along the way (The litigation journey)

S 56 CPA – What the Overriding Purpose Entails

- (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
- (3) A party to civil proceedings 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.
- (4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3)—
 - o (a) any solicitor or barrister representing the party in the proceedings,

- (b) any person with a relevant interest in the proceedings commenced by the party.
- (5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a [discretion with respect to costs](#).

Case Management

- The court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) [for the just, quick and cheap disposal of the proceedings](#): UCPR r 2.1; for examples, see UCPR r 2.3
- 'An approach to the control of litigation in which the court supervises or controls the progress of the case through its interlocutory phase.' (Colbran et al).
- Shift from 'adversarial' judging to 'managerial' judging (see ALRC report, Kirby J in JL Holdings).
- Directions re conduct at hearing: [CPA s 62](#)
- Availability of sanctions: [CPA s 61](#).
- Case management still guided by overriding purpose – not efficiency or cost alone.

Objects of Case Management – [s 57 CPA](#)

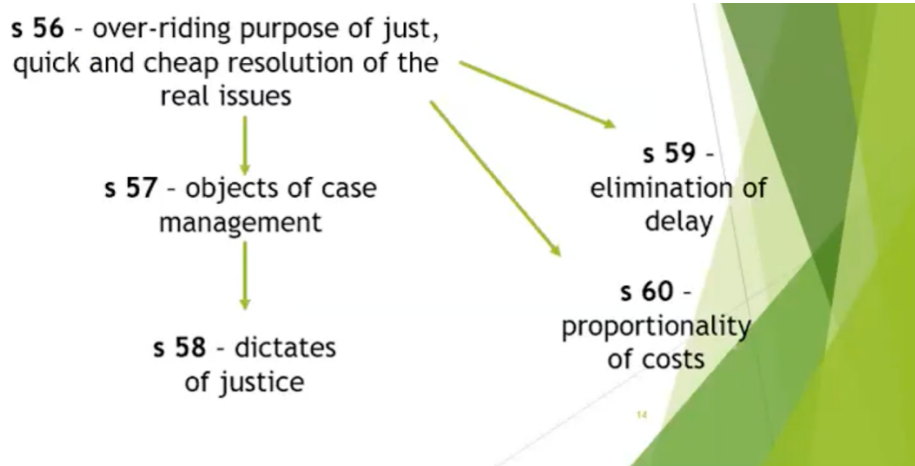
- (1) For the purpose of furthering the overriding purpose referred to in section 56 (1), [proceedings in any court are to be managed](#) having regard to the following objects—
- (a) the [just determination](#) of the proceedings,
 - (b) the [efficient disposal](#) of the business of the court,
 - (c) the [efficient use](#) of available judicial and administrative resources,
 - (d) the [timely disposal of the proceedings](#), and all other proceedings in the court, at a cost affordable by the respective parties.
- (2) This Act and any rules of court are to be so construed and applied, and the practice and procedure of the courts are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

Dictates of Justice – [s 58 CPA](#)

- Courts must seek to act with the dictates of justice in deciding whether to make any order or direction for the management of proceedings: s 58(1)
- Re '[dictates of justice](#)' in a particular case the court must have regard to ss 56 and 57 may have regard to:

- the degree of difficulty or complexity of issues in proceedings
- expedition of parties throughout proceedings
- degree to which any lack of expedition is due to circumstances beyond the control of the parties
- degree to which parties have fulfilled their duties under section 56(3)
- parties taking procedural opportunities
- the degree of injustice that would be suffered by the respective parties in consequence of any order or direction
- other matters as the court considers relevant in the circumstances of the case: s 58(2)

Putting it all together



CPA have given the courts a much more prominent role in the court system, especially dealing with case management (shift away from the adversarial model)

Consequences of failure to abide by directions – [S 61 CPA](#)

- (1) The court may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of court) for the speedy determination of the real issues between the parties to the proceedings.
- (3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:
 - (a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
 - (b) it may strike out or limit any claim made by a plaintiff,
 - (c) it may strike out any defence filed by a defendant, and give judgment accordingly,

- (d) it may strike out or amend any document filed by the party, either in whole or in part,
- (e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
- (f) it may direct the party to pay the whole or part of the costs of another party,
- (g) it may make such other order or give such other direction as it considers appropriate.

The Overriding Purpose frames the Civil Justice System

- The overriding purpose is:
 - o Relevant to all procedural decisions made by judges pursuant to the *CPA* and the *UCPR*
 - o Relevant throughout the entirety of the civil litigation process; and
 - o Relevant to the conduct and decisions of lawyers as civil litigators
 - o Relevant to costs orders the court might make
- Cases relevant to the significance of the overriding purpose:
 - o *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46
 - o *Hans Pet Constructions Pty Limited v Cassar* [2009] NSWCA 230
- Tensions within the overriding purpose
 - o It is clear that there are inherent tensions between justice efficiency and cheapness (*Halpin v Lumley General Insurance Ltd* (2009) 78 NSWLR 265, [28] (*Baston J*))

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

- Dispute over a lease to develop land
 - o Qld Minister had approved lease but not endorsed it
 - o Change of Government results in new minister not endorsing lease
- JL Holdings challenge decision
- After several interlocutory hearings and amendments, the state of Qld applies to amend their defence
- Kiefel J refuses leave to add new defence
 - o Tensions between interests of the parties and between individual and collective rights
- Qld appeal to FCAFC – Unsuccessful
 - o Majority dismissed appeal
- Qld then appeal to HCA – Successful
 - o Allowed Appeal – narrow conception of justice

- If party has issue that is fairly arguable, the case management issues should only be applied in narrow focus
- Individualistic focus on justice (Focusing on the interests of the parties) and saw money in the forms of a cost order as a way to balance any inequality

Application of the CPA and UCPR

- *Metropolitan Petar v Mitreski* [2008] NSWSC 293
 - [11] “Under part 6 of the CPA – the guidelines with case management and procedural applicated have changed considerably from the previous regime”
 - Ensures cases are dealt with justly
- *Tripple Take Pty Ltd v Clark Rubber Franchising Pty Ltd; Brooks v Clark Rubber Franchising Pty Ltd* [2005] NSWSC 1169
 - [7] Overriding purpose of the CPA – now enshrined in s 56, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings

Hans Pet Constructions Pty Ltd v Cassar [2009] NSWCA 230

- [23] It is a question, in my view, of balancing the [two obligations to the court](#)
 - (1) To provide a forum for parties, the fundamental duty as it is often described, [provide a forum for the parties to resolve their disputes](#) and giving them an opportunity for them to be heard and determined according to the rules and according to law
 - (2) Is providing for the quick, just and cheap resolution of those problems
 - Further, if necessary, with a view to ensuring that there is efficient and effective case management of these matters and in the case of ... (not transcribable) ... the magistrate is not left to pick up work or having to pick up other work or be reallocated other work if it is at all possible in such a short timeframe prior to the hearing date.

Halpin v Lumley General Insurance Ltd (2009) 78 NSWLR 265; [2009] NSWCA 372

Conclusion on Power

- [107] For these reasons – [Courts in NSW have power under the CPA and the UCPR to make orders relieving one party to civil litigation](#) from complying, in whole or in part, with directions that would otherwise require that party to disclose to the other in advance of the trial all affidavits and reports to be adduced in evidence at the trial

McGuirk v University of New South Wales [2010] NSWCA 104

- [162] The court is given power at any time to give such directions and to make such orders for the conduct of any proceedings, whether or not inconsistent with the rules of court, for the just, quick and cheap disposal of the proceedings

Aon Risk Services Australia v Australian National University (2009) 239 CLR 175

- Catastrophic 2003 Canberra bushfires damage some of ANU's property
- ANU commences proceedings against insurers
- It later adds its broker, Aon Risk Services, alleging failure to renew policies
- ANU applies for leave to add substantial new claim against Aon Risk – Allowed
 - o Similar to JL Holding Case
- First instance – Followed on from the ruling in Qld v JL Holding
 - o Allowed leave as long as ANU paid for Aon's cost as a result of the amendment
- Aon Risk applies to ACT CoA – Fails
- Appeals to HCA – **Successful**
 - o Majority Joint Judgement: JL Holding was prior to the *CPA* and the *UCPR*, and therefore, this case needed to be resolved solely relying on these rules
 - o Broad View:
 - Unclear how cost and efficiency will always be trumped by the needs of individual parties
 - As stated in the overriding purpose (s 56): Cost and efficiency are elements of a just outcome in themselves
 - o Balancing act between, costs, efficiencies and individual parties
 - o 'However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. *Case management is not an end in itself*. It is an important and *useful aid for ensuring the prompt and efficient disposal of litigation*. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim' (at 154).
 - o 'Justice is the paramount consideration in determining an application such as the one in question...Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence...' (at 155).

The HCA has continued to require adherence to the principles of case management established in *Aon Risk* in subsequent judgements in *UBS AG v Tyne* [2018] HCA 45 and *Rozenbilt v Vainer* (2018) 262 CLR 478; [2018] HCA 23.

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303

- [51] In *Aon Risk Services Australia Ltd v Australian National University* [(2009) 239 CLR 175 at 211 [92]- [93], 213 [98]], it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia.
- Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings.
- The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.

Michael Legg, "Reconciling the Goals of Minimising Cost and Delay with the Principle of a Fair Trial in the Australian Civil Justice System" (2014) 33(2) *Civil Justice Quarterly* 157

- Scholarly article on page 107 of the textbook