

# D&E

## Exam Notes

## Contents

0. Foundational concepts .....	5
0.1 Interconnectedness.....	7
0.2 Why civil procedure?.....	7
0.3 Justice .....	7
0.4 Professional conduct rules .....	9
1. Overview .....	<b>Error! Bookmark not defined.</b>
1. Lawyer-client relationship .....	10
1.1 The retainer .....	10
1.2 Other lawyer-client duties (beyond contract) .....	11
1.3 Terminating the lawyer-client relationship .....	13
1.4 Legislation .....	13
2. Solicitor-client conflicts of interest.....	15
2.1 Proscription against lawyer-client conflict .....	15
2.2 Legislation .....	18
3. Confidential information .....	19
3.1 Confidentiality .....	19
3.2 Privilege .....	19
3.3 Legislation .....	21
4. Discovery .....	22
4.1 Discovery .....	22
4.2 Inspection .....	23
4.3 Inadvertent disclosure.....	24
4.4 Legislation .....	25
5. The role of civil procedure in improving access to justice.....	27
5.1 The old system .....	27
5.2 The overarching objective .....	27
5.3 Legislation .....	29
5.4 Evaluating case management.....	30
5.5 Questions .....	31
6. Alternative dispute resolution.....	32
6.1 ADR overview .....	32
6.2 Mediation .....	33

6.3 Legislation .....	34
7. Pre-litigation considerations .....	37
7.1 Key considerations .....	37
7.2 Preliminary discovery .....	38
7.3 Legislation .....	40
8. Commencing and defending proceedings .....	42
8.1 Originating process .....	42
8.2 Service .....	44
8.3 Pleadings .....	44
8.4 Joinder .....	47
8.5 Defending against a claim .....	47
8.6 Legislation .....	48
9. Interim remedies .....	51
9.1 Default judgment .....	51
9.2 Summary judgment .....	52
9.3 Withdrawal and discontinuance .....	52
9.4 Interim orders .....	53
9.5 Legislation .....	55
10. Class actions and litigation funding .....	56
10.1 Class actions .....	56
10.2 Litigation funding .....	57
10.3 Legislation .....	57
11. Abuse of process .....	58
11.1 What is abuse of process? .....	58
11.2 Cases .....	59
11.3 Legislation .....	61
12. Concurrent and successive conflicts of interest .....	64
12.1 Concurrent conflicts of interest .....	64
12.2 Successive conflicts of interest .....	64
12.3 Legislation .....	68
13. Access to Justice .....	70
13.2 Questions .....	72
14. Admission to practice and discipline .....	73

14.1 Notes .....	73
14.2 Questions .....	76
15. Role of the lawyer .....	77
15.1 Notes .....	77
15.2 Questions .....	79
16. Colonialism .....	80
16.1 Notes .....	80
17. Law as a business .....	82
17.1 Business.....	82
17.2 Costs.....	82
17.3 Legislation .....	84
17.4 Role of the lawyer in this business .....	84
17.5 Questions .....	85
18. Gender.....	86
18.1 Notes .....	86
18.2 Question.....	87
19. MISC general knowledge topics .....	88
19.1 Judgments, orders, appeals.....	88
19.2 Allocating the costs of litigation .....	88

## Overview of topics

Assessable by hypo	Assessable by essay	Both
Discovery	Access to justice	Lawyer-client relationship
Commencing and defending proceedings	Admission to practise and discipline	Solicitor-client conflicts of interest
Interim remedies	Role of the lawyer	Confidential information
	Lawyers, the legal system and colonialism	The role of civil procedure in improving access to justice
	Case management	Alternative dispute resolution
	Law as a business	Pre-litigation considerations
	Gender	Class actions and litigation funding
		Abuse of process
		Concurrent and successive conflicts of interest

## Breaches and consequences

Rules	Provisions	Meaning
ASCR	r 2.3 'may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.'	suspension, removal, fines, restriction, education
CPA: overarch	s 29 court may make certain orders for contravention of overarching obligation	Adverse costs, financial compensation, specified steps to remedy
CPA: cooperate	s 20 A person to whom the overarching obligations apply <b>must cooperate with the parties</b> to a civil proceeding and the court in connection with the conduct of that proceeding.	If not, s 29^
CPA: case management	s 47 Without limiting any other power of a court, for the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the court may give any direction or make any order it considers appropriate, including any directions given or orders made— a. in the interests of the administration of justice; or b. in the public interest.	Can make 'any order it considers appropriate'
CPA discovery	s 56 Court may order sanctions if: failure to comply w discovery or discovery-related orders (1a, 1b), conduct intended to delay, frustrate or avoid discovery (1c); incl contempt (2a) and compensation order (2g)	Contempt, adjournment w adverse costs, indemnity costs against party or lawyer, prevent party from taking a step, prohibit use of documents as evidence, award compensation, compel give evidence, dismiss claim or defence, refer lawyer to disciplinary authority
SCR failure to comply with these Rules	o 2.01(2), the Court may...	Set aside proceeding or step of proceeding, make orders

# 0. Foundational concepts

## 0.1 Interconnectedness

Civil justice **system** - 'a group of interacting, interrelated, or interdependent elements forming a complex whole or a functionally related group of elements. Disturbance in one part of the system will procedure sometimes unpredictable consequences for other parts of the system.' (Genn 11)

- *Sexual misconduct or law as a business seep into substantive justice*
  - *One party's abuse affects another party's access*
  - *Not correctly navigating confidentiality can undermine public trust in system*
- 'The legal system, being a human system, is inevitably fallible' (Hayne 9)

## 0.2 Why civil procedure?

*If evaluate value of civil procedure rules, come here for the actual purpose of them -> do they adequately achieve these purposes?*

- Guarantee procedural fairness -> *consistent application* (Genn 13)
- Ensure judges have all appropriate evidence available - links to substantive outcome -> *discovery*
- Reflect a sense of justice -> *remains central tenant of justice system*
- Means by which substantive rights are enforced -> *case management and 3D*
- Perceived fairness by litigants (Genn 14) -> *perception is important*

*Inherent tension*

- Procedure requires reasonable balance between cost and accuracy (Solum quoted in Genn 15)
- 'There is no perfect rectitude of decision, justice cannot be dispensed instantly without some delay, and justice cannot be absolutely free of cost constraints. Each system has had to balance the competing demands and strike a compromise.' (Zuckerman quoted in Genn 16)

HAC recognises the application of procedural fairness as a right (Z 91)

## 0.3 Justice

### A fair trial

Elements of a fair trial

1. Unbiased and independent adjudication
2. Open Justice (Z 104)
3. D's right to be heard (Z 109)
  - Can present defence
  - Must have timely notice of case -> **service**
  - **Ex parte** or **default** only in exceptional circumstances

4. Judge provides reasons for a decision (Z 115)

- Can appeal
- Judicial accountability
- Develops the law (Genn 18)
- Distinguishes fair trial from vigilante justice (Raz)

*Victorian Charter of Human Rights and Responsibilities*: s 8 (recognition and equality before the law) s 24 (fair hearing)

*Constitution*: Ch III on judicial power

### Why justice?

*Genn argues justice is a public good because its purpose is to:*

- Provide legal structure for economic operation and government scrutiny (16)
- Provide peaceful, authoritative dispute resolution between actors in society
- Reflects and promotes social change (17)
- Safeguards individuals' rights
- Social justice, economic stability, social order
- People arrange their affairs in the light of its rules (20)
- Allow judges to clarify, develop and apply the law (Jolowicz) (18)

Raz's 8 principles of the rule of law:

1. All laws should be prospective, open and clear
  2. Laws should be relatively stable -> predictable bc backwards looking and independent (Hayne 8)
  3. The making of particular legal orders should be guided by open, stable, clear and general rules -> CPA, SCR
  4. Guaranteed judicial independence
  5. Observe principles of natural justice
  6. Courts can review the implementation of other principles
  7. Courts easily accessible -> costs
  8. Discretion of crime-preventing agencies should not be allowed to pervert the law
- Tribunal 'is tasked not with the independent pursuit of truth but with the arbitration of a contest between parties who assert different versions of the truth' (Gageler 249)
- *This arbitration requires accessing relevant information (discovery)*

### Justice system less adversarial

CPA 21: not mislead or deceive

ASCR 19.6: inform court of authorities against their client's case

ASCR 24: not advise witness to give false or misleading evidence, not coach witness

ASCR 29: prosecutor not inflame or bias the court



## Open justice

A system of justice can only be respected by society if they trust it is impartial, equal, transparent and principled (*Rares* [3])

Open justice principle in Australian law (Z 101)

- Public has right to access to court proceedings and materials (Z 104)
- 'justice must not only be done, it must be seen to be done' (Perram J in *EOX17 v Cth* [12])

ASCR r 5.1
5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to: <ul style="list-style-type: none"><li>5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or</li><li>5.1.2 bring the profession into disrepute.</li></ul>

## 0.4 Professional conduct rules

Purpose of professional conduct rules

- Standards expected of members [DP 1.125]
- Guide for disciplinary proceedings
- Help inexperienced lawyers understand their professional responsibility
- Highlights the seriousness with which lawyers view their responsibilities
  - Fosters trust

Professional conduct rules have an ethical dimension, they reflect the profession's collective judgment as to expected standards, ethos rather than exhaustive [DP 1.130]

- BUT they are also very technical and specific

Regulate professionals through a complaints process

Disciplinary options include suspension, removal, fines, restriction, education and criminal conviction (ASCR 2)

# 1. Lawyer-client relationship

## Breach

1. What is the scope of the retainer?
  - NOTE financial advice complexity w *Dominic*
2. Which duties to the client are relevant?
3. What are the consequences of breaching these duties?
4. How to avoid breaching?

## Termination

1. Entire-contract doctrine
2. Just cause (ASCR 13) + reasonable notice of withdrawal (ASCR 20)

## 1.1 The retainer

What is a retainer: contract between lawyer and client for provision of legal services (DP 3.05)

- Defines the boundaries of the lawyer-client relationship
  - Lawyer cannot recover costs for work that is outside of the retainer's scope
- Identifies client (DP 3.20)
  - Joint clients: must ensure that their authority to act represents the joint will of the clients
  - Take reasonable measures to ascertain the principal's identity before accepting instructions from an agent
- Prescribes expected services
- Outlines scope of lawyer's duties **and** authorities

Before finalising retainer:

- Is the identity of the client clear? (DP 3.35)
- Does the client have capacity? (DP 3.05)
- Are there professional reasons why I should not act for this client?

Requirements of retainer

- Retainer can be implied or explicit, oral (**but avoid**) or written (DP 3.05)
  - Person asserting existence of retainer has to prove it: e.g. lawyer files or notes
  - Ambiguity in express terms interpreted strictly against the lawyer (DP 3.25)
  - Implied: *Pegrum v Fatharly*: prepared contract for loan, only lawyer in room, clause of contract specified lender should pay lawyer fees, industry standard is lender pays fees, ultimately found implied retainer for lawyer to act for lender
- BUT costs agreement and costs estimation have to be written and advanced warning

Implied duties within retainer: (DP 3.30)

- Best interest of client
- Deliver services competently, diligently, promptly/ Exercise reasonable care and skill

- Follow client instructions
- Confidentiality
- Clear and timely advice -> public confidence

Retainer links to other types of lawyer-client duties: (DP [3.20])

- Torts: charts duty of care parameters
- Fiduciary: end when retainer ends
- Implies duty of confidentiality -> survives end of retainer though!
- Only way for lawyer to claim costs

## 1.2 Other lawyer-client duties (beyond contract)

Important to identify the source of duties

- Because the remedies are vastly different
- Once you've chosen what source- you open yourself up to different damages
  - Torts - damages
  - Contracts - maybe also injunction/specific performance
  - Fiduciary - e.g. adverse costs, disciplinary proceedings, may get them to re-do work. Imposes the largest suite of remedies
- Fiduciary, even if you can benefit from the breach, you can still sue; bona fide is not a defence for breach of fiduciary duties

Equity

- Fiduciary duty of loyalty
  - The relationship between lawyer and client is a fiduciary one in which loyalty to the client's interests, holding the confidence of the client's information, and the duty to avoid conflicts between the client's interests on the one hand and either their own or another's interest on the other hand, are fundamental (Forbes J in *Gobbo* [45])
  - Lawyers owe an 'undivided' duty of loyalty "without being distracted by other interests including personal interests" – *R v Neil* [24] per Binnie J (DP [6.05])
  - No conflicts of interest (DP 4.50)
  - ^ require informed consent to overcome: full understanding (DP 4.60)
  - Transparency
  - Avoid profiting from relationship outside of a **reasonable professional fee**
  - Proof of damage not required for liability, only proof of breach
- Duty to account: \$
- Duty of confidentiality
  - Survives retainer

Tort

- Usually set out by retainer
  - A lawyer who wishes to restrict the scope of the retainer and thus tortious duty 'should, especially where the client could be justified in expecting the

lawyer to advise on a broader basis, make full and clear disclosure of the limits of the duty the lawyer is undertaking, and counsel the client to secure advice from another person outside those limits. This is best effected via express provision in the retainer itself...' (DP 5.25)

- Usually does not go beyond retainer, e.g. don't have to provide financial advice bc not qualified (DP 5.100)
  - BUT depends on:
    - Improvidence of transaction and degree of client dependence on lawyer/client disadvantage (DP 5.130)
    - Vulnerability of client
    - Knowledge of lawyer
    - Experience of lawyer
    - Gravity of transaction vs wealth of client
  - Safest to counsel client to receive independent financial advice (*Dominic v Riz*)
- Technical proficiency, perform tasks to a certain level -> NOT outcome (DP 4.20)
- Presumed to owe a duty of care (DP 5.10)
- Advocates' immunity: barrister cannot be sued for not doing good enough job
- Duty to disclose all information relating to client affairs UNLESS: (DP 5.80)
  - Client gives informed consent to nondisclosure
  - Disclosure would breach law or court order

**Is there a tortious duty to advise clients outside of retainer's scope? No hard and fast rule:**

Case	<i>Dominic v Riz</i>
Facts	<ul style="list-style-type: none"> <li>• A were solicitors advising R on loan and mortgage documents, NOT underlying investment</li> <li>• R obtained loan to finance a high-risk business investment, had to mortgage family home</li> <li>• The investment failed and R lost most of their money, R sued A for breach of fiduciary duty and professional negligence</li> <li>• Trial judge held A negligent, breached duty of care bc was not reasonably satisfied that clients would follow up and obtain advice, A should have insisted on written instructions [59]</li> </ul>
Held	A was not negligent
Reasoning (Allsop P)	<ul style="list-style-type: none"> <li>• A was not retained to advise on the transaction itself [93]</li> <li>• A had no knowledge of intricacies of transaction               <ul style="list-style-type: none"> <li>○ 'To comment on any informed basis about the underlying transaction required a knowledge of it. She did not have that knowledge' [93]</li> </ul> </li> <li>• A told R they 'must' see an independent solicitor and financial advisor [28]               <ul style="list-style-type: none"> <li>○ 'need' 'should' [74]</li> </ul> </li> </ul>