

Overriding Purpose.....	4
Pre-Commencement Considerations.....	5
Limitation Periods.....	5
Res Judicata Estoppels.....	6
Standing To Sue.....	8
Joinders.....	9
Pre-Commencement.....	13
Interim Preservation Orders / Urgent Interim Relief.....	13
Freezing Orders.....	14
Criteria for Freezing Orders.....	18
Search Orders.....	18
Commencement.....	21
Originating Process.....	21
Response to Originating Process.....	22
[LEGISLATION] Proceedings wrongly commenced.....	23
[LEGISLATION] Notice to defendant.....	23
[LEGISLATION] Statement of Claim or Summons?.....	24
Pleadings.....	25
Particulars.....	29
Striking Out Pleadings.....	30
Service.....	32
[LEGISLATION] Service Constituting Personal Service.....	40
Service Outside of NSW But Within AU.....	41
Service Outside of Australia.....	42
After Commencement & Before Judgement.....	49
Costs & Delay.....	49
Dealing with Cost and Delay (Justice David Hammerschlag) [RCD Ch 5].....	49
Practice Notes for Case Management.....	57
Offers of Compromise.....	59
Failure to Comply With Offers of Compromise.....	61
Disclosure of Offer.....	62
Additional Provisions for Offers of Compromise.....	62
Cost Consequences (SPECIFY WHICH ONE).....	64
Cost Consequences (Simplified).....	65
Calderbank Letters.....	65
Rules Offers v Calderbank Offers.....	68
Security for Costs.....	69
Discovery.....	72
Privilege.....	72
Types of Privilege.....	73
Client Legal Privilege.....	74
Southland Coal (Summary of CLP).....	76
Loss of Client Legal Privilege.....	77
Discovery.....	81
Disclosure in the Equity Division.....	87
Distinction Between Discovery & Evidence.....	89
Discovery & Technology.....	89
Technology Assisted Review (TAR) [RCD Ch 20] Craig Macaulay.....	91
Subpoenas.....	93
Notice to Produce.....	99

Evidence.....	100
Affidavits.....	100
Witness Preparation.....	106
Summary Disposal.....	108
Summary Disposal Summary.....	108
Default Judgement.....	109
Summary Judgement.....	113
Summary Dismissal.....	114
Want of Prosecution.....	115
Appeals.....	116
Post-Judgment.....	120
Enforcement & Execution of Judgment.....	120
Representative Proceedings.....	125
Class Actions.....	125
Funding Litigation.....	130
Litigation Funding.....	132
Costs.....	133
General Rules to Costs.....	133
Proportionality of Costs.....	134
Type of Cost Orders.....	135
Lawyers & Costs.....	136
Specific Costs Orders.....	140
Technology in Law.....	140
Online Dispute Resolution.....	142
ADR.....	147
Types of ADR.....	150
Court-Annexed Mediation.....	164
Settlement Negotiation Privilege.....	167
Arbitration.....	168
Introductory Readings.....	178
Introduction to Civil Procedure (KLMS 1).....	178
The Need for Litigation (RCD Ch 3).....	182
Stages to Civil Litigation (Online Activity 0).....	185
The Supreme Court (Online Activity 1).....	188
NSW Court System (KLMS).....	189
Case Briefs.....	191
Additional Legislation.....	218

Definition: Right of P to be considered an appropriate party to initiate a particular proceeding

Before commencing proceedings, the appropriate defendant must be identified, which is usually clear. However when it is NOT CLEAR:

- Civil procedure mechanisms available to help identify them
- If there are multiple people + causes of action → selection of the ones where there is the most standing against them

Standing

Right of P as an appropriate party to initiate the particular proceedings

1. Private Cases

- Usually obvious in private cases as they are the ones who have suffered injury or loss (breach of contract or for damages)
- Standing is generally not an issue

2. Public Cases

- Issues of standing where they want to enforce public rights or duties under legislation
- Proceedings that test constitutional validity of laws
- Proceedings for review of decision of inferior courts or administrators

Relator

- In public cases, the Attorney-General can initiate proceedings for a public wrong or grant a fiat to allow a private person to sue (relator) who is liable for the costs of action
- Relation actions dependent on unfettered discretionary consent of AG that cannot be reviewed by courts
- Without a fiat, there are difficulties with standing to sue for private citizens

7.1 By whom proceedings may be commenced and carried on

- | | |
|------|---|
| (1) | A natural person may commence and carry on proceedings in any court, either by a solicitor acting on his or her behalf or in person |
| (1A) | Despite (1), but subject to (5), the court may order that proceedings commenced by a natural person acting on behalf of another person pursuant to a power of attorney be carried on, on behalf of that other person, by a solicitor. |
| (2) | A company within the meaning of the Corporations Act 2001 of the Cth— |
| (a) | may commence and carry on proceedings in any court by a solicitor or by a director of the company, and |
| (b) | may commence and, unless the court orders otherwise, carry on proceedings in the Local Court by a duly authorised officer or employee of the company. |
| (3) | In the case of proceedings in the Supreme Court, (2)(a) authorises a company to commence proceedings by a director only if the director is also a P in proceedings. |
| (4) | A corporation (not a company within meaning of above) may commence / carry on proceedings in any court by a solicitor, duly authorised officer or employee |
| (4A) | Unless Commission orders otherwise, carry on proceedings in the Industrial Relations Commission by an industrial agent (but does not apply if constituted as Industrial Court) |
| (5) | Despite (1)-(4), any person may commence and carry on proceedings in the Local Court unless the court orders otherwise |
| (a) | A person carrying out commercial agent activity that is debt collection (defined in s 60 Fair Trading Act) for proceedings on an application for instalment, examination order, writ of execution or garnishee order |
| (b) | Person holding a licence as a real estate agent, strata managing agent or on-site residential property manager |
| (6) | Solicitor who is recorded as a person's solicitor must hold an unrestricted practising certificate |

Joinders

Definition: Procedural rules allowing multiple parties or claims be combined into one single proceedings when they arise from the same transaction/series of transactions & involve common questions of law or fact

Rules & Thresholds

1. **Joinder of Causes of Action:** Generally less demanding than joinder of parties

a. RR 6.18, 6.22

2. **Joinder of Parties:** Should guide decisions on causes of action to avoid procedural inefficiency

a. RR 6.19 - 6.28

Joining Plaintiffs

1. Two or more plaintiffs may be joined in the same proceedings if their rights to relief arise out of the same transaction (or series of transactions) and common questions of law or fact would arise, or with leave of the court

a. [6.19]

2. Where multiple persons are jointly entitled to relief, all must be joined as plaintiffs (with consent), or otherwise joined as defendants (without consent)

a. [6.20]

3. A person cannot be joined as a plaintiff without their consent.

a. [6.25]

4. A person may apply to the court to be joined as a plaintiff.

a. [6.27]

Joining Defendants

The same as for P, but ALSO where liability is joint, several, or in the alternative – and if D is jointly liable, the court may stay proceedings until all such parties are joined [6.21(2)].

When can two or more persons be joined as Ps or Ds in the same originating process?

- UCPR r 6.19 –

6.18 Joinder of causes of action

- | | |
|-----|--|
| (1) | In any originating process, the plaintiff may claim relief against the defendant in respect of more than one cause of action in any of the following circumstances— |
| (a) | if the plaintiff sues in the same capacity, and claims the defendant to be liable in the same capacity, in respect of each cause of action, |
| (b) | A plaintiff may sue in both their representative (executor or administrator) and personal capacity regarding the same deceased estate, provided each cause of action is clearly attributed to the appropriate capacity. |
| (c) | A plaintiff may claim against a defendant in both their representative (executor or administrator) and personal capacity relating to the same deceased estate, provided each cause of action is distinctly connected to the relevant capacity. |
| (d) | if the court grants leave for all of the causes of action to be dealt with in the same proceedings. |
| (2) | Leave under (1) may be granted before or after the originating process is filed |

6.19 Proceedings involving common questions of law or fact

- | | |
|--|---|
| (1) | Two or more persons may be joined as plaintiffs or defendants in any originating process if – |
| (a) | separate proceedings by or against each of them would give rise to a common question of law or fact, and |
| (b) | all rights of relief claimed in the originating process are in respect of, or arise out of, the same transaction or series of transactions , |
| or if the court gives leave for them to be joined. (even if there is no common question of law/fact) | |
| (2) | Leave under (1) may be granted before or after the originating process is filed |

6.20 Proceedings affecting persons having joint entitlement

- | | |
|-----|--|
| (1) | Unless the court orders otherwise, all persons jointly entitled to the same relief must be joined as parties in any claim for that relief that is made by any one or more of them. |
| (2) | Unless the court orders otherwise, any other such person is to be joined— |

- Joinder is permitted where separate proceedings would involve a common question of law or fact and arise out of the same transaction or series of transactions, or where the court grants leave (before or after filing).

If D is sued in contract & knows another person is jointly liable, what should they do?

- UCPR r 6.21(2) –
- The defendant can apply for a stay of proceedings until all jointly liable parties are joined.
- UCPR r. 6.21(1) –
- If the liability is joint and several, the defendant may be sued alone without joining the others.

What should P do if another person is jointly entitled to the same relief?

- UCPR r 6.20 –
- The plaintiff must join that person as a co-plaintiff (with consent), or otherwise as a defendant if they do not consent.

What if joinder would cause embarrassment, inconvenience or delay?

- UCPR r 6.22 –
- The court may order separate trials or make any other suitable order to manage the proceedings.

Can the court remove a party who is no longer necessary?

- UCPR r 6.29 –
- Yes, the court may remove a party who is no longer a proper or necessary party to the proceedings

Can the court order the joinder of a person who should have been joined?

- UCPR r 6.24 –
- Yes, the court may order a person to be joined at any time if their presence is necessary for determining all matters in dispute

What can P do if unsure which of two defendants is liable?

- | | |
|-----|---|
| (a) | as a plaintiff, if he or she consents to being a plaintiff, or |
| (b) | as a defendant, if he or she does not consent to being a plaintiff. |
| (3) | Despite (1), a person may not be joined as a party to proceedings in contravention of any other Act or law. |

6.21 Proceedings affecting persons having joint or several liability

- | | |
|-----|---|
| (1) | A person who is jointly and severally liable with some other person in relation to any act, matter or thing need not be a defendant in proceedings with respect to that act, matter or thing merely because the other person is a defendant in those proceedings. |
| (2) | In any proceedings in which a defendant is one of a number of persons who are jointly, but not severally, liable in contract or tort, or under an Act or statutory instrument, the court may order that the other persons be joined as defendants and that the proceedings be stayed until those other persons have been so joined. |

6.22 Court may order separate trials if joinder of party or cause of action inconvenient

If the court considers that the joinder of parties or causes of action in any proceedings may **embarrass, inconvenience or delay** the conduct of the proceedings, the court—

- | | |
|-----|---|
| (a) | may order separate trials, or |
| (b) | may make such other order as it thinks fit. |

6.23 Effect of misjoinder or non-joinder of parties

Proceedings are not defeated merely because of the misjoinder or non-joinder of any person as a party to the proceedings.

6.24 Court may join party if joinder proper or necessary

- | | |
|-----|---|
| (1) | If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party. |
| (2) | Without limiting (1), in proceedings for the possession of land, the court may order that a person (not being a party to the proceedings) who is in possession of the whole or any part of the land (whether in person or by a tenant) be added as a defendant. |

- UCPR r 6.19 (implied) –
- The plaintiff may sue both defendants severally or in the alternative.
- **Cost Consequences:** If a successful defendant was unnecessarily joined, the plaintiff may be liable for their costs; however, if the unsuccessful defendant caused the joinder, the court may issue a Bullock or Sanderson costs order against them.

Transaction

A transaction refers broadly to an act or series of acts—does not need to be contractual—by one party that affects another, creating a legal connection sufficient to form the basis of potential litigation, even in the absence of mutual consent.

- Transaction refers broadly to an act whose effects extend beyond the agent, but **does not necessarily require a contractual relationship** (Bendir v Anson)
- [r 6.19(b)]
- Transactions must be common to all Ps & cannot consist merely of similar or separate transactions with different defendants – must be same transaction or the same series of transactions NOT just related ones
- Transaction can broadly include the accident, resulting injury & all matters relevant to litigation, such as limitation issues & procedural developments, offering a more expansive interpretation (Birtles)

Joinder by Leave

Even if there is no common question of law/fact, a court may make exceptions to grant a joinder by leave if justice would be served & cost/delays will be minimised

- A court may allow joinders under [6.19(1)(b)] despite failure to meet the transactions requirement if it is efficient & fair under the circumstances (Dean-Willcocks)

Consolidation

Procedure allowing different proceedings to be brought together where it would be appropriate because hearing the causes of actions together or one after another would achieve efficiency in cost & time

[28.5] Consolidation

6.25 Joinder as plaintiff requires party's consent

A person is not to be joined as a plaintiff in any proceedings except with his or her consent.

6.26 Joinder to recover costs

- | | |
|-----|--|
| (1) | Except to the extent to which these rules expressly provide, a party may not join another person as a party to any proceedings for the purpose of making an application for costs against the other person |
| (2) | This rule does not apply— |
| (a) | if the other person would otherwise be a proper party to the proceedings, or |
| (b) | if the party joins the other person by means of a cross-claim in respect of a claim for costs against the party. |

6.27 Joinder on application of third party

A person who is not a party may apply to the court to be joined as a party, either as a plaintiff or defendant.

6.28 Date of commencement of proceedings in relation to parties joined

If the court orders that a person be joined as a party, the date of commencement of the proceedings, in relation to that person, is taken to be the date on which the order is made or such later date as the court may specify in the order.

Bendir v Anson

Ps were owners of adjoining buildings affected in different ways by D's construction of a new building across the road

– Although D's construction could be seen as a "transaction" in the broader sense, there is **no common question of fact or law** between the P's claims → factual circumstances of each P's property were materially different

– Separate trials ordered as a joinder would embarrass or complicate proceedings & no common question of fact/law existed → discretionary application similar to [6.22]

– Where multiple plaintiffs are affected differently by the same act and there is no common question of fact or law, joinder may be refused and separate trials ordered under the court's discretion.

Birtles

P, injured by electric shock while using a crowbar at work, sued multiple Ds & later sought to

<p>If several proceedings are pending and it appears that –</p> <ul style="list-style-type: none"> (a) They involve a common question (b) Rights to relief claimed arise out of the same or series of transactions (c) It is desirable to make an order under this rule for some reason <p>The court may order these proceeding be consolidated, meaning tried at the same time or immediately one after the other / order them to be stayed until the determination of one</p> <ul style="list-style-type: none"> • This is rarely ordered, below is ordered more <p>[28.2] Order for decision</p> <p>Common questions in DIFFERENT proceedings are heard together so a binding decision for that issue can be made, where the rest of the balance of each proceedings are heard separately</p>	<p>join his former solicitor for negligence related to missed limitation periods</p> <p>–</p> <p>A “transaction” can include not only the accident and injury but also litigation-related circumstances such as limitation issues, allowing joinder where claims are closely connected in fact and context.</p> <p>–</p> <p>The Court allowed the joinder of the former solicitor as a defendant, holding that the claims arose from the same broad “transaction,” and separating the claims could unfairly prejudice the plaintiff (i.e., risk him falling “between two stools”).</p> <p>Payne v Young ☆</p> <p>Separate causes of action can only be joined under r 6.19 if they arise from the same transaction or the same series of transactions, not merely similar or related ones.</p> <p>Dean-Willcocks ☆</p> <p>Even where claims arise from separate transactions, joinder may be permitted under UCPR r 6.19(1)(b) if the court is satisfied that doing so is fair, efficient, and will not cause undue disadvantage to any party</p>
---	---

Pre-Commencement

Interim Preservation Orders / Urgent Interim Relief					
<p>The court can hear/determine applications for these forms of relief prior to commencement of proceedings, even on an ex parte basis (absence of defendant) so a plaintiff can protect its position in urgent situations</p> <ol style="list-style-type: none"> Interlocutory/Interim Injunctions: Temporary court order before proceedings start to protect a right by restraining D from damaging it <ul style="list-style-type: none"> a. Enables P to minimise any damage it may suffer from D’s threatened conduct Freezing Order: Restrain disposal, dealing with or diminishment of assets to ensure money is still there after proceedings <ul style="list-style-type: none"> a. As disappearance of assets will frustrate judgement – can also be done to third parties holding assets b. Also referred to as Mareva Orders Search Order: Court orders to secure/preserve evidence that D may try to destroy if it is 	<p>Commercial Arbitration Act 2010 (NSW)</p> <p>9 Arbitration agreement + interim measures by court</p> <p>It is NOT incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court to order an interim measure for protection + the court to grant that measure</p> <p>11 Appointment of arbitrators</p> <table border="1"> <tr> <td>(2)</td><td>Parties are free to agree on a procedure of appointing the arbitrator subject to provisions of subsections (4) and (5)</td></tr> </table> <p>17 Power of arbitral tribunal to order interim measures</p> <table border="1"> <tr> <td>(1)</td><td>Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party grant interim measures</td></tr> </table>	(2)	Parties are free to agree on a procedure of appointing the arbitrator subject to provisions of subsections (4) and (5)	(1)	Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party grant interim measures
(2)	Parties are free to agree on a procedure of appointing the arbitrator subject to provisions of subsections (4) and (5)				
(1)	Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party grant interim measures				

<p>b. Such as paying dividends (distribution of earnings to shareholders) to the respondent which may justify a limited freezing order (Cardiles)</p> <p>3. Relief Must Be Exercised Cautiously</p> <p>a. Court must ensure the order has principled legal basis and does not unduly interfere with third-party property rights</p> <p>b. Courts are warned against using “flexibility” to bypass a legal doctrine (Cardile)</p>	likely case, the court may discharge the orders obtained.
	<p>Westpac v Forum Finance A freezing order can be varied to allow a person to pay reasonable legal costs, so they can properly defend themselves and ensure a fair trial.</p>
	<p>PT Bayan Jurisdiction extended to granting of freezing orders for prospective judgements of foreign courts that is enforceable in Australia</p>

Criteria for Freezing Orders				
Criterion	Application	Practice Note	UCPR	Case
Arguable legal case	All		25.14(1)(b)	Marango
Real risk of asset dissipation	All		25.14(4)(b)	Marango; Jackson
Not used as pre-judgement security	All	5		Jackson
Notice and proportional scope (no random expansion)	All			Marango
Third party holds and controls D's assets	Third parties	7	25.14(5)(a)(i)	Cardile
Legal process may require a third party to assist with payment	Third parties	7	25.14(5)(b)	Cardile
Order made cautiously with proper evidence	All			Cardile; Jackson

Search Orders	
<p>Search order authorize the seizure of documents and other evidence to preserve evidence required to prove a claim that is at a risk of being destroyed</p> <ul style="list-style-type: none"> Permits applicant's lawyer and an independent supervising solicitor to enter the respondent's premises to search, copy documents and remove property Obtained on an ex parte basis – R has no notice + order obtained in their absence <p>Duty of Candour</p>	UCPR Part 25 Interim Preservation Div 3 Search Orders
	25.19 Search order
	Court may make a search order, in any proceeding or in anticipation of any proceeding in the court, with or without notice to the respondent , for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is or may be relevant to an issue in the proceeding or anticipated proceeding.
	25.20 Requirements for grant of search order

Violi v CBA

Default judgment overturned – substituted service order had not been clearly complied with. Strict compliance with service requirements is essential before entering default judgment.

- Affidavit of service merely stated that service in accordance with the substituted service order had taken place without providing the actual facts of service

Flo Rida v Mothership

An order for substituted service will be refused if the applicant fails to provide sufficient evidence that ordinary service is impracticable (NO EVIDENCE THAT A SUBSTITUTED SERVICE WOULD WORK BETTER IN ALERTING BRO)

Nash v Stewart

Substituted service under UCPR r 10.14 is **not available for subpoenas requiring personal service** under r 33.5(1), because penal consequences necessitate strict compliance with formal service requirements.

- Unless the subpoenaed person had actual knowledge of the subpoena under r 33.6(3)
- Or the service constitutes personal service if the person keeps house under r 10.26

Takeaway

Court's power to order substituted service is conditional on the applicant proving that service under the normal rules is impracticable.

In simpler terms, the court will make an order for substituted service of an originating process if it is satisfied that the method is reasonably effective to bring proceedings to the knowledge of D

Confirmation of Informal Service

This is a retrospective application where service did not comply with the rules, but the defendant actually became aware of the proceedings

- The court may order that the person is **taken to have been served** on a specific date.
- The key requirement is that the **defendant received procedural fairness** and had **notice of the proceedings**.

the proceedings generally

- (4) The court may not take action of the kind referred to in (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.

Hunter v Hanson

It was not an error for the court to extend time for service of a statement of claim where delay was reasonably explained and did not cause prejudice.

Clairs Keely v Treacy

A funding agreement and lawyer's retainer must be rewritten to allow informed consent by funded litigants.

Flo Rida ☆

A District Court cannot make a substituted service order under UCPR r 10.14 unless (1) personal service is impracticable, and (2) the proposed method is likely to bring the document to the defendant's attention while still lawfully within jurisdiction—otherwise, jurisdiction is not enlivened under s 47 District Court Act 1973 (NSW)

Bulldogs ☆

Where there is substantial compliance with a substituted service order and the documents are brought to the defendant's attention, the Court may make an order under UCPR r 10.14(2)–(3) deeming service to have occurred, even if not all procedural steps were strictly followed.

10.9 Waiver of objection to service

If a party takes **responsive action** (e.g., filing a defence or engaging in proceedings), they are **deemed to waive any objection** to improper service.

- To preserve the right to object, a party must raise the **service objection first, before** taking any substantive steps in the case

- BUT, overmanagement with multiple directions hearings may increase costs
- Irony of incurring more costs by arguing about them or spending time preparing/filing budgets in the UK following reforms

Attitude of Judges

Judges need to approach case management with enthusiasm to its underlying philosophy

1. Large leeway of control leads to cookie cutter procedures
2. Too much management leads to forcing of quick judgements regardless of what the parties say
3. Treating it as a formal, standardised, administrative burden is counter-productive to the purpose

Responsibility of Practitioners

Lawyers lack control over their behaviour in an adversarial system where they rack up unnecessary costs. There are **two types of practice**:

1. Client's problem is examined to arrive at the best possible result at the lowest possible cost that sacrifices fees that might be earned
2. Disputes treated as a way to generate fees

Courts need to encourage litigation to be run in a more cost-effective manner, possibly through adherence of court procedures and rules

Spigelman CJ p 65 - 67

- Justice delayed is justice denied
- Effective + efficient use of resources best done by dividing caseload into distinct categories with specialised law and judges
- UCPR is sufficiently flexible to allow for different requirements of each case where the key reform was UNIFORMITY across CPA and courts

Jackamara v Krakouer

Delay almost always impedes the proper disposition of any case that does not go to trial promptly as memories fade + records may be lost → which also adds to costs when the case takes longer to prepare, resulting in an overall burden for the system that keeps another case out of the lists for that day. Delay in final judgement prolongs uncertainty/worry felt by the litigants

Everts v Liepins

59 and 60 of the CPA recognise that delay + case backlog affect public cost in delivering justice and court's ability to provide individualised justice

Pye v Pye

Proceedings determined in D's absence due to non-appearances and failure to follow procedures as the court was not required to indefinitely delay completion of the hearing in hopes that D would appear – relied on Part 5 of the CPA regarding overriding principles

Darkinjung Local Aboriginal Council v Minister

Collaborative effort to achieve overriding purpose that should not be dismissed – in this case the failure to identify/focus on issues led to large volumes of irrelevant material, lengthy submissions and discussions

McGurik v UNSW

Width of power conferred by 2.1 differs from 61(1) as it is not confined to making directions for speedy determination and the power to give directions/orders for conduct of ANY proceedings

Aon Risk Services

Speed and efficiency should not detract from a proper opportunity being given to the parties to plead their case @ 98

Asic v Rich

Procedural fairness entails cost and delay; creating special procedures to shorten proceedings simply to deal with the length of trial raises a risk of injustice
Delay and case backlog minimises the court's ability to provide individual justice but requirements to provide procedural fairness may also generate costs
Allowing right to procedural fairness may impact rights of other litigants

Worldwide Corporation v GPT

Court may need to make an unjust decision to the party for the sake of doing justice to its opponent + other litigants as what is seen as justice to one party may be the imposition of costs and delay to another
Purpose requirement mandates the balance of justice, cost and delay → esp when they are used as tactical weapons to allow one side an advantage over the other

Offers of Compromise		
<p>Definition</p> <p>A formal written proposal made by one party to another to settle on specified terms to avoid further litigation, where there will be costs if not accepted</p> <ul style="list-style-type: none"> Encourages early resolution and reduced trial burden as failure to accept a reasonable offer has cost consequences <p>Types of Offers of Compromise</p> <p>1. Statutory</p> <p>a. Under UCPR r 20.26 - 20.29</p> <p>2. Common Law</p> <p>a. Calderbank Offers (below)</p> <p>Formal Requirements</p> <ol style="list-style-type: none"> Must be in writing [r 20.26(1)] Must be exclusive of costs but can include limited cost proposals [r 20.26(3)] Must specify period it remains open; min 28 days before trial, unless <2 months before trial Acceptance must also be in writing [r 20.28] Difficult to withdraw [r 20.28] <p><i>Costs Consequences (Special Costs Order)</i></p> <p>The court may penalise the rejecting party by making them pay the other side's legal costs from the date of the offer where the rejecting party does not get a better outcome at trial</p> <ul style="list-style-type: none"> A formal offer of compromise under Part 20 of the UCPR that is rejected by a party that fails to obtain a better result at trial The court may make a special costs order under [CPA 98] or Part 42 Div 3 of the UCPR This often requires the rejecting party to pay indemnity costs from the date of the offer <p><i>Example</i></p>	r 20.26 Making of offer	
	(1)	In any proceedings, any party may, by notice in writing , make an offer to any other party to compromise any claim in the proceedings, either in whole or in part, on specified terms
	(2)	An offer under this rule— [formal requirements for making an offer]
	(a)	Must identify—
	(i)	The claim or part of the claim to which it relates, and
	(ii)	The proposed orders for disposal of the claim or part of the claim, including, if a monetary judgment is proposed, the amount of that monetary judgment, and
	(b)	If the offer relates only to part of a claim in the proceedings, must include a statement—
	(i)	In the case of an offer by the plaintiff, as to whether the balance of the proceedings is to be abandoned or pursued, or
	(ii)	In the case of an offer by a defendant, as to whether the balance of the proceedings will be defended or conceded, and
	(c)	Must not include an amount for costs and must not be expressed to be inclusive of costs , and
	(d)	Must bear a statement to the effect that the offer is made in accordance with these rules, and
	(e)	If the offeror has made or been ordered to make an interim payment to the offeree, must state whether or not the offer is in addition to that interim payment, and
	(f)	Must specify the period of time within which the offer is open for acceptance
	(3)	An offer under this rule may propose—
	(a)	A judgment in favour of the defendant—
	(i)	With no order as to costs, or
	(ii)	Despite subrule (2)(c), with a term of the offer that the defendant will pay to the

	<ul style="list-style-type: none"> The arbitrator must provide a written award with reasons, and send it to the court.
Step 4	
Rehearing of matter is dissatisfied	<p>Section 42</p> <ul style="list-style-type: none"> A person aggrieved by the award may apply to court for a rehearing (full or partial). <p>Section 44</p> <ul style="list-style-type: none"> On rehearing, the court hears evidence anew, and the original award ceases to have effect. <p>Section 46</p> <ul style="list-style-type: none"> The court may order costs for the rehearing or the original arbitration
Contract-Based Arbitration (Private Clause)	
Step 1	
Does the contract validly refer the dispute to arbitration?	<p>Section 1 & 7</p> <ul style="list-style-type: none"> Is it a domestic commercial arbitration? Is there an arbitration agreement in writing (including email)? <p>Section 8</p> <ul style="list-style-type: none"> Court must refer matter to arbitration if there's a valid agreement, unless: <ul style="list-style-type: none"> The agreement is null, void, inoperative or incapable of being performed. <p>Section 16</p> <p>Arbitrators have power to determine their own jurisdiction under s 37</p> <p>Section 38</p> <p>Referral to arbitration</p>
Step 2	

Early Neutral Evaluation	A process where a neutral evaluates the key issues early in a dispute and suggests ways to resolve it without deciding facts
Expert Appraisal	An advisory process where an expert investigates and provides advice on facts, likely outcomes, and how the dispute might be resolved
Expert Determination	A determinative process where an expert with subject-matter expertise decides the outcome of a dispute
Facilitation	A collaborative process where a facilitator helps a group identify and resolve issues, but does not influence the content or outcome
Indigenous Dispute Resolution	Culturally specific practices—such as elder arbitration or consensus-building—used by Indigenous communities to resolve disputes
Judicial ADR	ADR processes conducted by judges or magistrates, such as settlement conferences, excluding formal adjudication
Mediation	A process where a mediator facilitates discussion between disputing parties to help them reach a voluntary, non-binding agreement
Mini-Trial	A structured process where parties present their case to a neutral who offers non-binding advice on facts and possible outcomes (similar to case presentation).
Ombudsman	An independent official who investigates and resolves complaints, especially against government agencies or regulated industries.
Private Judging	A process where parties appoint a private judge (often a former judicial officer) to hear and decide a dispute as if it were in court

Theory (KLMS Ch 4)

Limitations of a litigation mindset

A litigation mindset means lawyers ONLY consider problems in terms of applicable law, likely outcome + cost of litigation where it is about WINNING

Adversarial Mindset (Australian Law Reform Commission 1997) – p 193

The adversarial mindset is a perspective that brings time + cost consuming and complex regime of litigation

The New Lawyer (Macfarlane) – p 194

1. Rights-based model assumes the source of conflict is an object of moral principle where over-reliance causes blindness to ADR
2. Many disputes in reality are not suitable for a rights-based argument which may escalate it
3. In negotiation, there is no single winner or losers and involves information sharing for MUTUAL gains
4. Lawyers should recognise that disputes will usually be resolved through negotiation
5. **Zero-Sum Game:** Concept of bargaining where one side's loss is another's gain (TO WIN) → approach to negotiation as if it litigation
6. Instead of arguing FOR or AGAINST → examine VARIOUS possible benefits that can be negotiated
7. For institutional/commercial clients → assumption that litigation is the business-like way to go is changing due to rising legal costs where they want more efficient + less costly resolution → more inclined to assert expectations + participate more in discussions

<i>Wollongong City Council v Legal Business Centre Pty Ltd [2012] NSWCA 245</i>	
Tags	SECURITY FOR COSTS
Facts	<ol style="list-style-type: none"> 1 WCC sought security for costs against LBC, a corporate plaintiff 2 Trial judge dismissed the application, relying on LBC's ownership of burdened land + other discretionary factors 3 Council appealed, arguing the trial judge misapplied the legal test + erred in assessing D's financial position
Issue	Whether the trial judge erred in refusing to order security for costs under UCPR r 42.21 and s 1335(1) Corporations Act 2001 (Cth) on the basis of LBC's financial position and the exercise of discretion.
Reasoning	<p>The court must first be satisfied there is reason to believe LBC would be unable to pay WCC's costs if ordered</p> <ul style="list-style-type: none"> - LBC as a trustee had negligible net assets and insufficient income to meet costs - Beneficiaries could not cover costs + had not offered to do so - Preliminary onus is on the applicant / defendant, then onus shifts to the plaintiff - Trial judge erred by not properly engaging with LBC's financial evidence + accepting insufficient grounds for rejecting the application - If P's adverse financial circumstance was caused by D, then the onus is on P to establish adequacy of its financial position and causation [33] - Persons who stand behind the corporation may offer to be responsible for costs [34] - While there had been delay in applying for security, it is a relevant factor but it did not amount to a disentitling factor because the claim was still at the pleadings stage - Court should adopt a practical common sense approach to the examination of financial affairs of the corporation - LBC failed to prove that the WCC's conduct caused or materially contributed to its impecuniosity, nor did it show financial adequacy prior to dealings with the Council
Outcome	Appeal allowed, trial judge's decision quashed. LBC was ordered to pay \$100,000 as security for future costs LBC ordered to pay WCC's costs at first instance AND on appeal, with liberty granted to seek further security
Ratio	Where a corporate plaintiff is shown to lack sufficient assets or financial capacity to meet a potential adverse costs order, and no persuasive discretionary factors exist to the contrary, the court should exercise its discretionary judgement to order security for costs.

<i>Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 744</i>	
Tags	SECURITY FOR COSTS FOR CORPORATIONS
Facts	<ol style="list-style-type: none"> 1 D applied for a security for costs order against P; P was a corporation without clear financial capacity 2 Application raised issues about how courts should balance fairness to Ds with access to justice for impecunious Ps
Issue	Whether the Court should exercise its discretion under s 1335(1) Corporations Act 2001 (Cth) and UCPR r 42.21 to order the plaintiff corporation to provide security for costs.
Reasoning	<p>The discretion to award orders is broad, fact-specific and must balance fairness</p> <ul style="list-style-type: none"> - Protect Ds while avoiding injustice to under-resourced Ps - The inability of a corporate P to meet potential adverse costs orders is often a decisive factor but NOT determinative - Unlike corporations, a natural person's impecuniosity is a factor to be weighed in the exercise of the discretion and is neither a sufficient condition for ordering or declining of security costs - Security for costs should not be used as an instrument of oppression by shutting out a small company from making a genuine claim against a large company - It should not become a weapon where an impecunious company can use its ability to pay costs as a means of putting unfair pressure on a more prosperous company <p>Key Guidelines from Beazley J in KP Cable</p> <ol style="list-style-type: none"> 1. Applications should be brought promptly before the incurring of many expenses 2. Courts consider strength and bona fides of P's claim 3. Impecuniosity caused by D's conduct weighs against ordering security 4. Whether the application for the order is oppressive; denying an impecunious P the right to litigate 5. Consideration of persons standing behind the company who would benefit from the litigation + whether they have offered security 6. Whether the persons standing behind the company have offered any personal undertaking to be liable for costs, if yes, what form? 7. Generally, orders are only made against P or the appellant, NOT made against Ds forced to litigate <p>Evidentiary burden initially lies on D</p> <ul style="list-style-type: none"> - D must provide credible evidence of P's inability to pay to be entitled to the order