

70104 CIVIL PRACTICE

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LECTURE 1: INTRODUCTION

PROCEDURAL LAW

- Procedural law is the law that governs the conduct of proceedings before the court → “rules which are directed to governing or regulating the mode or conduct of court proceedings” – *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 26- 27 per Mason CJ
- Method of proceeding to enforce a right → “adjectival” law, distinguished from substantive law
- Substantive law defines legal rights, duties, powers and liabilities, governed by the *lex loci delicti* in tort law → the applicable law is the law of the place where the wrongful act took place
- Procedural law is governed by the *lex fori* → the applicable laws of procedure & evidence will be laws of the court which is hearing the claim
- The purpose of procedural law is to provide rules to facilitate dispute resolution → need to provide procedural fairness to the parties in litigation
- Also concerned with promoting access to justice → ensuring that the rules address issues of cost and delay
- Procedural law is an important component of the rule of law
- Modern procedural law has an important role in managing the flow and conduct of litigants → practical economic & bureaucratic functions → important in an litigious age where costs of court action are increasing

THE SIGNIFICANCE OF PROCEDURE

Dame Hazel Genn, “Introduction: what is civil justice for?” in Hazel Genn (ed), *Judging Civil Justice, 2009 Hamlyn Lecture* (Cambridge University Press, 2010) pp12-16

- The rules guarantee procedural fairness
- The system is designed to ensure that judges have all the appropriate evidence available so that they can find the material facts and apply the substantive law to those facts
- In this way, procedural rules reflect a sense of justice + means by which substantive rights are enforced
- If substantive justice lies in the correct application of legal principles to a factual scenario. Then procedures that increase the likelihood of a correct decision being reached are vital
- Procedure is important to litigants → an important influence on user perceptions of the fairness of the legal processes
- Meaningful participation in legal proceedings + opportunity to be heard + requires a reasonable balance between cost and accuracy
- Adrian Zuckerman → measuring the success of procedures in doing justice is a complex judgement relating to rectitude of decision, time and cost. “Each system has had to balance the competing demands and strike a compromise”

SOURCES OF PROCEDURAL LAW

POWERS PROVIDED BY STATUTE

- Sources of procedural law in the NSW Supreme, District and Local Courts are mainly found in the *Civil Procedure Act 2005* (NSW) (CPA) + *Uniform Civil Procedure Rules 2005* (NSW) (UCPR)

- CPA provides that a Uniform Rules Committee may make rules that are consistent with the CPA
- Each specific court Act (*Supreme Court Rules 1970, District Court Rules 1973 & Local Court Rules 2009*) deal with jurisdictional matters, the constitution of the court and delegation of powers
- Rules of evidence (used in hearing substantive causes of action) are mainly found in the *Evidence Act 1995* (NSW) + common law

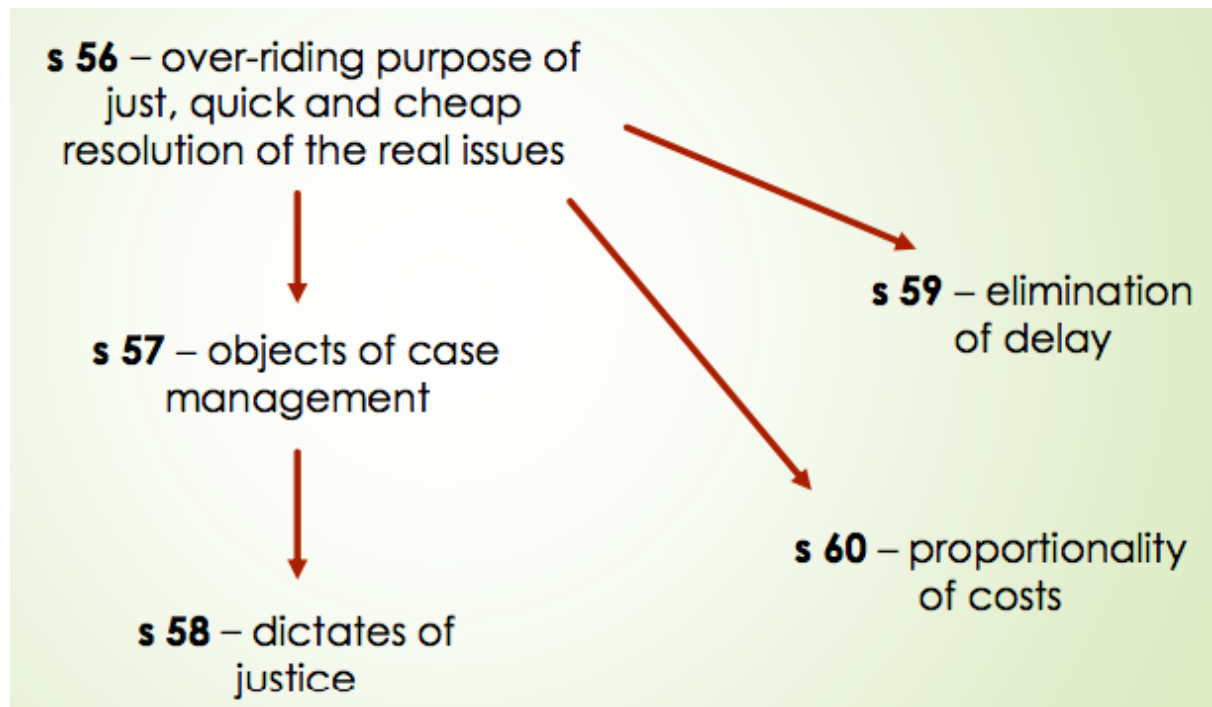
INHERENT AND IMPLIED JURISDICTION

- There is inherent jurisdiction (or inherent power) in superior courts of record → regulate their processes + prevent an abuse of process: *Jago v District Court of New South Wales* (1989) 168 CLR 23 and *Batistatos v Roads and Traffic Authority of NSW* (2006) 226 CLR 256
- District & Local Court have limited jurisdiction → arises expressly or is derived by implication from statute: *Grassby v R* (1989) 168 CLR 1
- It is the general responsibility of a superior court of unlimited jurisdiction (Supreme Court of NSW) for the administration of justice which gives rise to its inherent power → exercises full plenitude of judicial power
- Examples of devices originally derived from Courts inherent jurisdiction:
 - o Security for costs orders
 - o Asset preservation orders
 - o Search and seizure orders
- An implied power may be found where the court has jurisdiction under its statute but no provision is made in the statute for the making of an order which is necessary to carry out the courts statutory powers: *R v Mosely* (1992) 22 NSWLR 735
- In the case where a courts powers are defined by statute (District & Local Court), “there is an implied power to that which is required for the effective exercise of its jurisdiction”: *TKWJ v The Queen* (2002) 212 CLR
- Statutory court has the power to do that which is “really necessary to secure the proper administration of justice in the proceedings before it”: *John Fairfax & Sons LTD v Police Tribunal (NSW)* (1986) 5 NSWLR 465
- Term “necessary” does not mean “essential” but rather “subjected to the touchstone of reasonableness”: *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435

GUIDING PRINCIPLES FOR PROCEDURE – THE OVERRIDING PURPOSE

- The CPA sets out that the “overriding purpose of this Act and of the rules of the court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings”: **s 56** → court must seek to give effect to the overriding purpose
- A party to the proceedings is under a duty to assist the court to further the overriding purpose and a solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of this duty: **s 56(4)**
- The court is to act in accordance with the dictates of justice in deciding whether to make any order or direction for the management of proceedings, including orders for amendment or adjournment: **s 58**
- Dictates of justice → court must have regard to the overriding purpose + objects of case management (**ss 56 and 57**) + regard to matters set out in **s 58(2)(b)**:
 - (i) The degree of difficulty or complexity to which the issues in the proceedings give rise;

- (ii) The degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities and;
 - (iii) Degree to which any lack of expedition is due to circumstances beyond the control of the parties
 - (iv) Degree to which parties have fulfilled their duties under section 56 (3)
 - (v) Parties taking procedural opportunities
 - (vi) The degree of injustice that would be suffered by the respective parties as a consequence of any order or direction
 - (vii) Other matter as the court considers relevant in the circumstances of the case: **s 58(2) CPA**
- CPA requires the court to implement its practices and procedures with the object of eliminating delay: **s 59**
 - CPA requires the court to implement its practices and procedures with the object of resolving issues between the parties in such a way that the cost to the parties is proportionate to the importance & complexity of the subject matter in dispute: **s 60**



- Historical context → expensive, long, inaccessible litigation; UK reforms (Lord Woolf Report); legislative reforms to Australian jurisdictions
- The object of the overriding purpose of CPA is not about the court's final decision on the substantive rights and interests in the legal dispute, rather it is relevant to the process through which the dispute is resolved – the procedural decisions of judges & the conduct of judges, parties and lawyers.

CONSEQUENCES OF FAILURE TO ABIDE BY DIRECTIONS