

CIVIL PRACTICE EXAM NOTES

Procedural Law

Cheat sheet to CPA

Part 3 → Commencing and Carrying proceedings generally

Part 4 and 5 → Mediation and Arbitration (ADR)

Part 6 → Case management and interlocutory matters

Part 7 → Judgement and Orders (costs)

Part 8 → Enforcement of judgements

Part 9 → Transferring court

Cheat sheet to CPR

Part 2 → Case management

Part 5 → Preliminary discovery and inspection

Part 6 → Commencing proceedings and appearance

Part 10 → service of documents generally

Part 13 → summary disposal

Part 14 → Pleadings

Part 15 → Particulars

Part 18 → Notice of motion

Part 21 → Discovery, inspection, and notice to produce documents

Part 35 → Affidavits

Part 42 → Costs

Introduction to Procedural Law

Section 56 - overriding purpose

Section 57 - objects of case management

Section 58 - court to follow dictates of justice

Section 59 - elimination of delay

Section 60 - proportionality of costs

Section 61 - directions as to practice and procedure generally

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; **McKain v RW Miller & Co (SA) Pty Ltd (1991) 174 CLR 1 at 26-27**, per Mason CJ” – Kumar, Legg, Metzger & Steele, Civil Procedure in New South Wales (Lawbook Co, 2025, 5th ed), 2.

Sometimes described as ‘adjectival’ law – distinguishes it from ‘substantive law.’

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170 at 176-7.

Purpose of procedural Law

- It provides the institutions and rules which facilitate dispute resolution
- 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 – it has practical economic and bureaucratic functions which are very important in a litigious age where the costs of court action are ever-increasing.

Sources of procedural law

- **The legislature:** the NSW Government, which creates statutes like the Supreme Court Act 1970 (NSW) and the Civil Procedure Act 2005 (NSW);
- **The executive:** For example, the Uniform Civil Procedure Rules 2005, made pursuant to the CPA; and
- **The judiciary:** through the inherent jurisdiction of superior courts, court practice notes, and judicial decisions, the courts develop their own forms of procedural law.

Adversarial System

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; and
- The expenses fall largely on the parties.

Inquisitorial System

Key features:

- Source of law found in authoritative statements of legal principles issued by the state e.g. 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; and
- Lawyers are not as central to the court hearing and litigation process – emphasis is on written submissions. The judiciary is proactive and inquisitorial.

Inherent and Implied Jurisdiction

Inherent jurisdictions

- 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.** → **what they have delegated powers to do**
- Examples of devices originally derived from Court's inherent jurisdiction:
 - Security for costs orders
 - Asset preservation orders
 - Search and seizure orders

Implied jurisdiction

- An implied power may be found where a 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 court's statutory power (**R v Mosely (1992) referring to Stanton v Abernathy (1990)**).
- In the case of a court whose powers are defined by statute, such as the District Court and the Local Court, 'there is an implied power to do that which is required for the effective exercise of its jurisdiction' (**TKWJ v The Queen (2002)**).
- A 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 Group v Local Court of NSW (1991)**).
- The term 'necessary' does not mean 'essential' but rather it is to be 'subjected to the touchstone of reasonableness' (**Pelechowski v Registrar, Court of Appeal (NSW) (1999)**).

Overriding purpose → s56 CPA

Section 56(1) CPA

- '(1) 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.'
- Historical context: expensive, long, inaccessible litigation; UK reforms (Woolf Report); legislative reforms to Australian jurisdictions.
- '(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):
 - (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.
- The object of the overriding purpose
 - The overriding purpose of the CPA is not about the court's final decision on the substantive rights and interests in the legal dispute e.g. you can't invoke the overriding purpose to determine if someone actually breached a contract, committed a tort etc.
 - Rather, it is relevant to the process through which the dispute is resolved – the procedural decisions of judges and the conduct of judges, parties and lawyers along the way (i.e. the litigation's journey rather than final destination).
- The overriding purpose is:

- Relevant to all procedural decisions made by judges pursuant to the Civil Procedure Act 2005 (NSW) and the Uniform Civil Procedure Rules 2005 (NSW);
- Relevant throughout the entirety of the civil litigation process; and
- Relevant to the conduct and decisions of lawyers as civil litigators.
- Relevant to costs orders the Court might make.
- Cases relevant to the significance of the overriding purpose:
 - **Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited [2013] HCA 46**
 - **Hans Pet Constructions Pty Limited v Cassar [2009] NSWCA 230**
- 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**). **JUST**
- CPA requires the court to implement its practices and procedures with the object of eliminating delay. **S 59** requires the court to implement its practices and procedures with the object of eliminating any lapse of time between the commencement of proceedings and their final determination beyond that which is reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial. **QUICK**
- CPA requires the court to implement its practices and procedures with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute (**s 60**). **CHEAP**

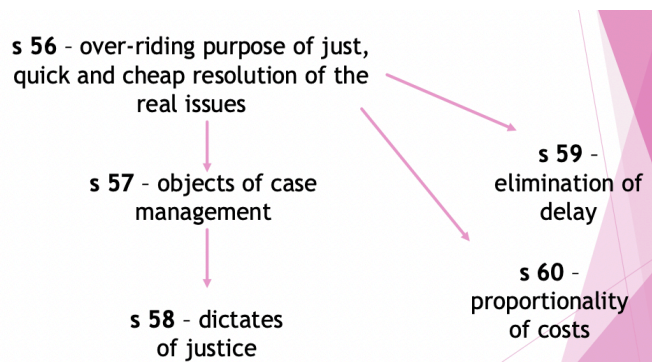
Case management → s57 CPA

- '(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).'
- '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 is still guided by overriding purpose – not efficiency or cost alone.

Dictates of Justice → s58 CPA

- Court 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) CPA. Re 'dictates of justice' in a particular case, the court must have regard to ss 56 and 57, and may have regard to:
 - (i) the degree of difficulty or complexity of issues in proceedings,
 - (ii) expedition of parties throughout proceedings,
 - (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 matters as the court considers relevant in the circumstances of the case.: s 58(2) CPA



Consequences of failure to abide by directions → s61

- '61(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.'

Access to Justice

- 'Access to justice is about ensuring Australians receive appropriate advice and assistance, no matter how they enter our justice system.
- Access to justice goes beyond courts and lawyers (although these are important too). It incorporates everything people do to try to resolve the disputes they have, including accessing information and support to prevent, identify and resolve disputes. This broad view of access to justice recognises that many people resolve disputes without going to court and sometimes without seeking professional assistance.
- AG's report A Strategic Framework for Access to Justice in the Federal Civil Justice System describes 4 waves of access to justice reform:
 - Access to justice as equal access to legal services (such as lawyers and legal aid) and courts;
 - Access to justice as correcting structural inequalities within the justice system e.g. demystifying legal procedures, changing court procedure to make it less traumatic for victims etc;
 - Access to justice as an emphasis on informal justice e.g. greater use of ADR; and
 - Improve access to justice by lowering costs and improving the allocation of judicial resources through competition policy.
- Barriers to justice
 - Legal and justice systems
 - Socio-economic status
 - Interlocking systems of oppression
 - Economic, social, gender, sexual, ability and racial privilege
 - Unfamiliarity of the law
 - Location
 - Settler colonialism
- ALRC Report 1999
 - Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System. Some key findings relevant to access to justice:
 - 'Access to justice' is never going to be perfectly realised in practice.
 - Access to justice is not synonymous with obtaining a favourable outcome.
 - Access to justice means access to more than just the courts proper. It observed the proliferation of tribunals, community justice centres, Ombudsmen and government agencies.
 - The report discussed the importance of case management in triaging disputes in the context of limited court resources and time.