

# RCD

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## INTRO

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- TO DO in Conference:
  - ask for facts; who are the parties involved (if company → ask ASIC Company search); don't have witness in the same room; ask for their story; ask for documents and any correspondence; make sure the client sends you all their records
    - → First step before looking at the procedure
    - → self-protective measure → check statutory limitations (the period of the act)
    - → How are we or the client going to pay for litigation and how is the defendant going to pay → Defendant could claim for security costs → reply to their cost order
    - → the companies may opt for an undertaking to pay for the costs so the company can get a guarantee for the costs
    - → whether the issue is within the same state
    - [https://lawright.org.au/legal-information/limitation-periods/#:~:text=Some%20examples%20of%20limitation%20periods:%20\\*%20persona,l,act%20\(s%20138%20Anti%2DDiscrimination%20Act%201991%20\(Qld\)\).](https://lawright.org.au/legal-information/limitation-periods/#:~:text=Some%20examples%20of%20limitation%20periods:%20*%20persona,l,act%20(s%20138%20Anti%2DDiscrimination%20Act%201991%20(Qld)).)
- Judicial function → unique institutional, constitutional and governmental context
  - Judge – acting in capacity as an appointed judicial officer – within institutional system of justice
- Court = body invested with decision making powers (judicial independence)
  - Principle of open justice → must be available to the public
  - Note: can depart from the principle e.g. closed court, non-publication etc.
  - Necessary to ensure proper administration of justice? – [Hogan v Hinch](#)
  - Impartiality, integrity, nonpartisanship
- Judicial power = not easily definable
  - Adjudging and punishing the criminal guilt of citizens
  - Power to enforce decisions
  - Arbitral proceedings? – derives power/authority from consent of the parties
- Procedural fairness → given a hearing etc. – FAIR TRIAL
  - Judicial fact finding – decide case only on evidence/common knowledge
  - Duty to give reasons
  - Principle of finality
- Fair trial → inherent in CH III?
  - [Stead v State Government Insurance Commission](#)
    - TJ – told counsel not to address opposing witness's evidence, based decision on this evidence
    - For a re-trial, → needs to show denial of natural justice deprived him of the possibility of a successful outcome. → Properly conducted trial could not have possibly produced a different result.
  - [Mastronardi v NSW](#)
    - NSW prison officers failed to ensure protection against threat of attack – alleged miscarriage of justice?
    - Must be some substantial wrong or miscarriage – yes, part of the evidence was misapprehended and not relied upon (material factual errors)
  - As recognized by human rights legislation (International Covenant on Civil and Political Rights, Human Rights Act (ACT)), Charter of Human Rights and Responsibilities Act (Vic)

- Resolution of the instant dispute
- Creation of precedent - most often incremental, derived from previous cases
  - E.g. Mabo
- Judge does not have authority to give advisory opinions or answer hypothetical questions
- The crown as the model litigant – standard of fairness (follow rules)

#### HOGAN V HINCH

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- Order made prohibiting the names of convicted sex offenders to be identified (under Serious Sex Offenders Monitoring Act 2005)
  - Court declared section 42 = not invalid
  - Public administration of justice – not an absolute rule
  - Order was a reasonably appropriate, serves legitimate end in a constitutional manner

## THE VITALITY OF LITIGATION

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- Courts **permit parties to settle disputes without the courts** – if the rule of law can be maintained without adjudication
- Except – where:
  - What is sought to be enforced is a right – e.g. constitutional/government regulation
  - Private law rights of great public concern
  - Sufficient element of legitimate public interest
  - Court approval? – representative proceeding or class action
- Litigation – develops precedent
  - Without continuation of litigated outcomes = greater uncertainty for disputants
- **Reasons for litigation?**
  - Urgent relief
  - Interim or interlocutory injunctions
    - Arbitral tribunal does not have any power to grant interim measures prior to commencement of proceedings
      - Or on an ex parte basis – must apply to the court
  - Freezing orders, Search orders
  - Compel disclosure of information e.g. preliminary discovery
  - Access to the state's enforcement mechanisms
    - E.g. dishonesty, unable to honour negotiated settlement, dispute is unlikely to be defended

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### THEMES

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- The social purpose(s) & function(s) of the civil justice system
- Possible degradation of civil justice, including through increased use of ADR
- Distributions of power & resources and how courts can control imbalances
- Interrelationships and interactions amongst different parts of the civil justice system
- Public vs private aspects of civil justice
- Role of the Overriding Purpose of the CPA
- Substantive vs procedural law
  - Substantive = rights duties and liabilities
    - Law where the wrongful act was committed
  - Procedural law = conduct of proceedings – court specific rules
    - Trans substantive – does not impact on the substantive law itself

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### PROCEDURAL LAW

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- ADVERSARIAL SYSTEM
  - Civil Procedure Act 2005 (NSW)
  - Uniform Civil Procedure Rules 2005 (NSW)
  - Court Rules – E.g. Supreme Court Rules 1970, District Court Rules 1973, Local Court Rules 2009
  - Practice Notes
  - Inherent power of courts to regulate their processes and prevent an abuse of process

S 56 CPA → (1) **just, quick and cheap** resolution of the real issues in the proceedings

## S 56

(1) The overriding purpose of this act and the 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.

(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 a civil proceeding 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.

### District Court

- Has jurisdiction in civil and criminal matters
- Civil jurisdiction has limit of \$1.25 Million
- Unlimited jurisdiction in claims for damages for personal injuries arising out of motor vehicle accidents or work injuries

### Local Court

- Small Claims Division
- Claims up to \$20,000
- General Division
- Claims between \$10,000 and \$100,000
- Jurisdictional limit of \$60,000 for personal injury or death claims
- Can also hear criminal summary prosecutions, committal hearings, matters concerning mental health issues, some family law matters, children's criminal proceedings, juvenile prosecutions and care matters, licensing issues and coronial matters

## ALTERNATIVES TO LITIGATION

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- *Legal Profession Uniform Law Australian Solicitors' Conduct Rules/Conduct (Barristers Rules)*
  - Practitioner must inform client about alternatives to fully contested adjudication

## ALTERNATIVE DISPUTE RESOLUTION

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- Mediation, Arbitration, Negotiation

➔ + full range of alternatives to litigation potentially available to resolve a civil dispute

- Substantial growth of ADR in past 30 years (less cases referred by courts to mediation)
- [ALRC – Review of the Adversarial system in Litigation](#)
  - Litigation mindset of lawyers who operate in an adversarial system of litigation
  - Most lawyers are not litigators ➔ cautious attitude, anticipates litigation
- [The New Lawyer: How settlement is transforming the practice of law](#) – Julie McFarlane
  - Individualist approach – rights of the individual will be recognised and upheld, lawyers' primary responsibility
  - [Source of conflict](#) = uncompromisable moral principle or indivisible good

- System of rule-based adjudication – charged with the stewardship of rights
  - Must understand, respect and promote rights entitlement
- A zero-sum game – bargaining in which one side’s loss is the other’s gain
  - Negotiation as an adjunct of litigation
  - Through understanding information
- Corporate and institutional clients
  - Led to rising legal costs
  - Demands for less costly, more efficient methods of dispute resolution
  - Assertion of expectation for efficiency
  - Greater client involvement

Benefits	Disadvantages
<ul style="list-style-type: none"> <li>● Access to justice</li> <li>● Faster</li> <li>● Save time and money</li> <li>● More participation</li> <li>● Flexibility, creativity</li> <li>● Cooperative</li> <li>● Reduce stress</li> <li>● Remain confidential</li> <li>● Produce good results</li> <li>● More satisfying</li> </ul>	<ul style="list-style-type: none"> <li>● Suitability</li> <li>● Lack of court protections</li> <li>● Lack of enforceability</li> <li>● Disclosure of information</li> <li>● Cost</li> <li>● Delay</li> <li>● Fairness</li> <li>● Delaying tactics</li> <li>● Inequality</li> <li>● Defendant could ignore the ADR → No reply</li> </ul>

- Why We Still Litigate – Phillip Armstrong
  - Important principle is involved → Need for legal precedent
    - Need to send a message to the market place
  - Settlement would open floodgates to frivolous litigation
  - Claim is so large that the discipline of litigation is called for
  - Law is heavily weighted in its favour
  - Senior management unalterably opposed to settlement
  - Multiple parties – consensus would be difficult to achieve
- Against Settlement – Owen Fiss
  - Adjudication uses public resources – power defined and conferred by public law, not by private agreement
  - Not to maximise private parties, nor secure peace
  - Give force to the values in the constitution/statute
    - Court as reactive institution
- Whose Dispute is it Anyway – Carrie Menkel-Meadow
  - Settlement may be more just – in the need for less compromise and narrowing of legally cognizable issues
  - Litigation has led to monetisation of disputes
  - Settlement = more options, craft solutions – greater expression of remedial possibilities
  - Best aspects of settlement:
    - Consensual, represent goals of democratic and party initiated legal regimes
    - Broader range of solutions = more responsive
    - Moral commitment to equality, precision in justice, peace etc.
    - Based on important non-legal principles or interests
    - More humane, democratic, participatory, cathartic