LAWS2371

Resolving Civil Disputes

Comprehensive Course Notes

University of New South Wales | Faculty of Law

1. Introduction to Civil Dispute Resolution

1.1 Substantive vs Procedural Law

Civil procedure is the body of rules governing how substantive legal rights are enforced through court proceedings. A foundational distinction exists between substantive and procedural law.

- Substantive Law: defines legal rights, duties and liabilities. The applicable substantive law is ordinarily the law of the place where the relevant conduct or act occurred.
- Procedural Law: governs the conduct of proceedings before the court. Procedural law is used to enforce substantive rights but does not itself alter those rights. It applies regardless of where the substantive wrong occurred.

The two categories interact constantly in practice. Pleadings are governed by procedural rules, but the facts pleaded must support a substantive cause of action. Limitation periods, while procedural in form, have been treated as substantive in private international law contexts.

1.2 Purpose and Sources of Procedural Law

Procedural law serves several overlapping public and private functions:

- To facilitate dispute resolution by providing orderly processes.
- To guarantee procedural fairness (natural justice/due process) to all litigants.
- To promote access to justice, including for under-resourced parties.
- To address systemic concerns about cost and delay in civil litigation.
- To maintain public legitimacy and confidence in the legal system.

In New South Wales, the primary sources of procedural law include:

- Civil Procedure Act 2005 (NSW) (CPA): the central statute.
- Uniform Civil Procedure Rules 2005 (NSW) (UCPR): detailed procedural rules applicable across NSW courts.
- Court-specific rules: Supreme Court Rules 1970, District Court Rules 1973, Local Court Rules 2009.
- Practice Notes issued by each court's chief judge or presiding officer.
- Inherent jurisdiction of superior courts to regulate their own processes and prevent abuse.

Ashby v Commonwealth of Australia (No 4) [2012] FCA 1411 [4]
Courts possess unlimited power over their own processes to prevent those processes from being used for the purposes of injustice. Proceedings that are seriously or unfairly burdensome, prejudicial or damaging, or productive of serious and unjustified trouble or harassment, or that employ the court's process for an ulterior or improper purpose, are examples of abuse of process.

1.3 The Overriding Purpose: CPA s 56

Section 56 of the CPA establishes the foundational overriding purpose that governs all civil proceedings in NSW:

> **Civil Procedure Act 2005 (NSW) s 56**
> 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. The court must seek to give effect to this purpose when exercising any power, and each party is under a duty to assist the court to further this purpose.

The tripartite formula of 'just, quick and cheap' requires courts and practitioners to balance substantive fairness against efficiency considerations. Section 56 has teeth: courts may take into account any failure to assist the court when exercising a discretion with respect to costs (s 56(5)). Third parties who fund or influence litigation also bear obligations under s 56(6).

1.4 The NSW Court Hierarchy

Civil proceedings in NSW are distributed across courts according to the value and nature of the claim:

Court	Civil Jurisdiction	Key Lists/Divisions
Supreme Court of NSW	Unlimited; Common Law >$1.25M; Equity jurisdiction	Common Law Division; Equity Division; Court of Appeal
District Court of NSW	Up to $1.25M civil; unlimited for motor vehicle/work injury claims	General List; Commercial List; Construction List; Defamation List
Local Court of NSW	Small Claims: up to $20,000; General: up to $100,000; PI/Death: up to $60,000	Small Claims Division; General Division

1.5 Overview of Civil Litigation Steps

Civil litigation proceeds through a staged sequence, though ADR may occur at any point:

1. Pre-commencement steps: investigation, demand letters, obtaining instructions.
2. Filing and service of originating process (statement of claim or summons).
3. Appearance by defendant; filing of defence and any cross-claims.
4. Case management directions hearings.
5. Discovery and subpoenas.
6. Filing of evidence by affidavit.
7. Trial (witness examination, submissions, judgment).
8. Appeal (if any).
9. Enforcement of judgment.

2. Alternatives to Litigation and ADR

2.1 The Professional Obligation to Advise on ADR

Legal practitioners bear a professional duty to advise clients about alternatives to litigation. This obligation is codified in the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015:

> **Solicitors' Conduct Rules 2015 r 7.2**
> A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

2.2 What is ADR?

Alternative Dispute Resolution (ADR) is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them (National Dispute Resolution Advisory Council).

The terminology is debated: some prefer 'Assisted Dispute Resolution' (reflecting the role of a neutral facilitator) or 'Appropriate Dispute Resolution' (reflecting that ADR is not merely alternative but often the best option). Statistical data confirms ADR effectiveness: settlement rates in ADR processes range from 50-85% (Victorian Law Reform Commission). In the Supreme Court of NSW, 20-30% of filed cases were referred to mediation between 2017-2021, up from just 9% in 2005.

2.3 Types of ADR Processes

- Facilitative: Mediation, Facilitation, Facilitated Negotiation. The neutral facilitates discussion but makes no recommendations or decisions.
- Advisory: Expert Appraisal, Case Appraisal, Case Presentation, Mini-Trial, Early Neutral Evaluation. A neutral offers a non-binding opinion or assessment.
- Determinative: Arbitration, Expert Determination, Private Judging. The neutral makes a binding or influential determination of the dispute.
- Combined: Conciliation, Conferencing. Mix of facilitative and advisory elements.
- Hybrid: Med-Arb (Mediation/Arbitration). The same neutral shifts from mediator to arbitrator if mediation fails.

2.4 Settlement vs Litigation

The tension between settlement and litigation generates an ongoing debate in civil procedure scholarship:

In favour of settlement: institutional and corporate clients are sensitive to rising legal costs, creating demand for efficient dispute resolution. Strategic settlement planning can deliver outcomes faster and at lower cost than full adjudication.

Against settlement (Owen Fiss): Adjudication uses public resources and public officials whose task is to explicate and give force to values embodied in authoritative texts (constitutions,

statutes). This duty is not discharged when parties settle. Courts serve more than the immediate disputants; they develop the law for the benefit of all.

Carrie Menkel-Meadow argues settlement can offer broader 'remedial imagination', crafting solutions tailored to parties' real needs, whereas adjudication is limited to the remedies the legal system formally recognises.

2.5 Positional vs Interest-Based Negotiation

Two dominant frameworks for understanding negotiation:

Positional Negotiation	Interest-Based Negotiation
Focus on competing positions	Focus on satisfying underlying interests
Zero-sum approach (limited resources)	Seeks to expand the pie through creative options
Information protection and obfuscation	Information sharing between parties
Concessions made slowly and incrementally	Development of BATNA as alternative benchmark
Rights (often legal) asserted to justify position	Independent objective criteria for evaluating options
Vulnerable to gridlock	Better chance of mutually beneficial outcome

2.6 BATNA (Best Alternative to Negotiated Agreement)

Developed in the Harvard Negotiation Project, the BATNA concept is central to interest-based negotiation. It represents the course of action a party will take if negotiations fail and no agreement is reached.

Steps for developing a BATNA:

10. List all realistic alternatives if negotiations fail.
11. Evaluate each alternative and calculate its expected value (probability of success multiplied by likely outcome, less costs).
12. Select the alternative with the highest expected value: this is your BATNA.
13. Calculate your reservation value: the worst deal you would accept before turning to your BATNA.

Key strategic insights: A party with a strong BATNA negotiates from a position of strength. Understanding the other party's BATNA reveals their reservation value. Where a party's BATNA is weak, a deal that appears unfavourable may still be better than the alternative. Advisers must clearly communicate legal costs, probability of success, expected recovery, and risk of loss to enable clients to accurately assess their BATNA.

3. Enforceability of ADR Clauses and Settlement Negotiation Privilege

3.1 Court-Annexed Mediation

Courts may order parties to participate in mediation even without their consent. This power is codified in the CPA:

> **CPA s 26 - Referral by court**
> If it considers the circumstances appropriate, the court may, by order, refer any proceedings before it, or part of any such proceedings, for mediation by a mediator, and may do so either with or without the consent of the parties to the proceedings concerned.

Practice Note SC Eq 7 illustrates mandatory referral in specific contexts: all family provision applications in the Equity Division are referred to mediation at the earliest practicable time; contested proceedings involving the validity of testamentary instruments are ordinarily referred before directions for final hearing.

3.2 Enforceability of ADR Agreements

The enforceability of contractual dispute resolution clauses depends on the type of ADR process:

- Arbitration clauses are directly enforceable under the Commercial Arbitration Act 2010 (NSW). Section 8(1) requires a court before which an action is brought in a matter subject to an arbitration agreement to stay proceedings and refer the parties to arbitration, unless the agreement is null and void, inoperative, or incapable of being performed.
- Mediation and conciliation clauses: where parties have agreed to conciliate or mediate, courts may enforce that agreement as a precondition to commencing proceedings (Aiton v Transfield [1999] NSWSC 996). There is no specific legislative basis for enforcement, but contractual principles apply.
- Good faith negotiation clauses: enforceable in appropriate circumstances (United Group Rail Services v Rail Corp NSW [2009] NSWCA 177).

> **Aiton v Transfield [1999] NSWSC 996 [42]**
> *There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration. However, if parties have entered into an agreement to conciliate or mediate their dispute, the court may, in principle, make orders achieving the enforcement of that agreement as a precondition to commencement of proceedings in relation to the dispute.*

> **United Group Rail Services v Rail Corp NSW [2009] NSWCA 177 [79]-[80]**
> *The public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, real and enforceable content be given to dispute resolution clauses, to encourage parties to resolve disputes without expensive litigation. Good*