

Civil Practice – 70104

Lecture 1 - Introduction to Civil Procedure in NSW; Guiding Principles; Case Management and the Overriding Purpose.....	2
Lecture 2 - Access to Justice; Open Justice; Pre-litigation steps and client care.....	8
Lecture 3 – Alternative Dispute resolution.....	13
Lecture 4 - Commencing Litigation, Drafting Pleadings and Service.....	23
Lecture 5 - Evidence in Proceedings.....	31
Lecture 6 – Interlocutory applications and injunctions.....	40
Lecture 7 – Costs.....	50
Lecture 8 – Strike out, Summary disposal and Vexatious litigants.....	58
Lecture 9 – Judgement enforcement and Appeals	66

Lecture 1: Introduction to Civil Procedure in NSW; Guiding Principles; Case Management and the Overriding Purpose

Focus
Themes: 1. The overriding purpose of the Civil Procedure Act 2005 (NSW) – s 56; 2. The impact that technology is having on legal practice; 3. Sometimes a lawyer's duty to the court may seem to conflict with our duty to the client.
Procedural Law
- Procedural law is needed - We need to know how to present issue to the court in ways that they are going to accept and understand. - Procedural law is the law that governs the conduct of proceedings before the court, the “rules which are directed to governing or regulating the mode or conduct of court proceedings” - <i>McKain v RW Miller & Co</i> (1991) - Sometimes described as ‘adjectival’ law - governs the method of how substantive rights/law rights are being enforced – “Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained” - <i>Adam P Brown Male Fashions v Philip Morris</i> (1981) Purpose of procedural law: - It provides the institutions and rules which facilitate dispute resolution. - Is an important component of the idea of the rule of law. This encourages people to recognise the authority of the legal system and people to submit to it. - Modern procedural law helps manage 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 is ever- increasing.
Adversarial system
- Origins in the English common law. Key features: - Determining legal disputes according to their individual circumstances and related judge-made case law and legislation; - An inductive form of legal reasoning (we take the law from many different cases and build it into a principle which can be applied); - The trial is the distinct and separate climax to the litigation process; - impacted by procedural law - Court-room practice subject to rigid rules; - The proceedings are essentially controlled by the parties (dictate pace of case) with an emphasis on oral arguments – judiciary largely reactive rather than proactive; and – impacted by procedural law - The expenses fall largely on the parties. – impacted by procedural law

Inquisitorial system

- Origins in revolutionary France and Roman legal tradition.

Key features: **Much greater role for judicial fact finding**

- Source of law found in authoritative statements of legal principles issued by the state e.g. Civil and Criminal Codes e.g. Code de napoleon;
- A deductive form of reasoning from the general principle to be applied to the case;
- 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.

Key difference is the role of the state.

- England: intense distrust of government (give power to judges)
- France: use the State to catch up to revolutionised England (empower State)
- Both have the goal of maintaining social order.

Sources of procedural law in NSW

Three sources which form the framework of NSW procedural law, divided between each arm of the government:

1. **The legislature:** the NSW Government, which creates statutes like the **Civil Procedure Act 2005 (NSW) (CPA)** which regulates Civil procedure in NSW in the Supreme Court and other courts in s4. **The CPA was about streamlining and simplifying procedures, and removing unnecessary differences in courts, leading to efficiency and cost savings for parties and court.**
 2. **The executive:** For example, the **Uniform Civil Procedure Rules 2005 (UCPR)**, made pursuant to the CPA so a form of delegated legislation. These rules cover commencing to enforcing matters. They are not a code, and compliment the inherent jurisdiction of the court; and
 3. **The judiciary:** through the inherent jurisdiction of superior courts, court practice notes, and judicial decisions, the courts develop their own forms of procedural law. The Court interpreted the operation of the UCPR and CPA.
- **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]*

Examples of devices originally derived from Court’s inherent jurisdiction:

- Security for costs orders
- Asset preservation orders
- Search and seizure orders

3.1 Also pay attention to the **XXX Court Rules** for procedural rules CPA s 11 “The uniform rules prevail over any provision of any local rules unless the uniform rules expressly provide that the provision of the local rules is to prevail.” The list is in Schedule 2 of the UCPR e.g. all parts of the Land and Environment Court Rules 2007.

3.2 Practice notes – guide in filling in the gaps between the rules CPA s 15 “Subject to rules of court, the senior judicial officer of the court may issue practice notes for that court in relation to civil proceedings to which this Act applies”

3.3 Courts have inherent jurisdiction to regulate their own processes and prevent the abuse of power – *Jago v District Court of NSW*

Considerations when making procedural decisions and the case management framework

1. s 56(1) of the CPA – Overriding Purpose of civil procedure

(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**.”

1.1 Consider s 59 - elimination of delay (in the procedure of court, with adequate preparation time)

1.2 Consider s 60 – proportionality of costs (procedure should enable costs being proportionate to the complexity of the dispute)

1.3 Whenever the court is acting, it must have the overall purpose in mind:

(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**.

E.g. if the successful litigant has not been abiding by the duty to further the purpose in causing delay, they may be ordered to pay costs, or not receive costs. Unsuccessful litigant could be required to pay more costs to winner than otherwise would have been through indemnity costs

1.4 The object of the overriding purpose:

- **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
- **Rather, it is relevant to the procedural decisions and conduct of the parties through which the dispute is resolved.**

2. The overriding purpose underpins the objects of case management – s 57 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).’

3. 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

Regarding the dictates of justice in a particular case the court must have regard to ss 56 and 57, and may have regard to: s 58(2)(b) CPA

- (i) the degree of difficulty or complexity of issues in proceedings, (e.g. in the case of determining the allowing of an adjournment)
- (ii) expedition of parties throughout proceedings,
- (iii) degree to which any lack of expedition is due to circumstances beyond the control of the parties, (e.g. illness causing lack of fulfillment of obligations)
- (iv) degree to which parties have fulfilled their duties under section 56 (3), (e.g. parties not acting to further overriding purpose)
- (v) parties taking procedural opportunities, (e.g. parties raising things late when they had opportunities to do things before)
- (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

S 61 CPA - (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.’

Significance of the overriding purpose

The overriding purpose frames the system by:

- Being a relevant consideration for all procedural decisions made by judges pursuant to the CPA) and the UCPR
- Relevant throughout the entirety of the civil litigation process; and
- Relevant to the conduct and decisions of lawyers as civil litigators.

Significance:

- Court describes how the parties have the right to bring case, but the **Courts are no longer on the side lines and are going to be actively involved in the process** - *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013]
- The reforms of the system of civil litigation in New South Wales in recent years, typified by the CPA and the UCPR **reflect the deliberate governmental aims of promoting and facilitating the speedy disposition of proceedings** in order that citizens of the State can obtain prompt resolution of their complaints. **These matters must be steadily borne in mind at all times** - *Hans Pet Constructions Pty Limited v Cassar* [2009]

Tension within the overriding purpose

1. 'What will be required in most cases is the resolution of a tension between speed (including avoidance of delay), reduction of costs and the proper consideration of the issues raised by the parties, especially in cases of complexity.' - *Halpin v Lumley General Insurance* (2009), Basten J
2. **Case management** – Impact of the overriding purpose on the day to day decision in cases - *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910)– “rules and forms of procedure are not ends themselves, but means to an end, which is the attainment of justice”

Definition: ‘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.

- 2.1 The court may, by order, give such directions as it thinks fit ... for the speedy determination of the real issues between the parties to the proceedings - s 61(1) CPA
- 2.2 The court may, ... give such directions and make such orders for the conduct of any proceedings as appear convenient ...for the just, quick and cheap disposal of the proceedings’ - UCPR r 2.1
- 2.3 The overall purpose in the CPA **makes no distinction between justice and case management (quick, cheap)**, thus the principles of case management do not only apply to ‘extreme circumstances’ to shut out a party from litigating an issue that is fairly arguable - *Aon Risk* overturned *JL Holdings* - **Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings.** This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account’ - *Aon Risk Services Australia v ANU* (2009)

Pre CPA, *JL Holdings* held: these principles should not be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. But it ought always to be borne in mind ... that the ultimate aim of a court is

the attainment of justice and no principle of case management can be allowed to supplant that aim' - *Queensland v JL Holdings Pty Ltd* (1997)

Open Justice

Purpose of Open justice

1. Spigelman CJ - It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public ... is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public - *John Fairfax Publications v District Court of NSW* (2004)
2. Open justice is important to protect in order to uphold the rule of law, the idea that the state will administer law impartially between juridically equal citizens. Power will be exercised according to its rules, not arbitrarily.
3. Spigelman CJ – “Publicity of proceedings is one of the great protections against the exercise of arbitrary power and a reassurance that justice is administered fairly and impartially. *R v Richards & Bjorker* (1999)

Exceptions to the rule

4. Only depart from open justice in exceptional circumstances – A court can only depart from the open justice rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule - *John Fairfax & Sons v Police Tribunal* (NSW) (1986)
 - 4.1 “The application of the open justice principle may be limited in the exercise of a superior court’s inherent jurisdiction or an inferior court’s implied powers. This may be done where it is necessary to secure the proper administration of justice’ *Hogan v Hinch* (2011)
 - 4.2 These powers to conduct proceedings in the absence of the public are largely codified in (the court will proceed ‘in camera’):
 - 4.2.1 s 71 CPA, (b) if the presence of the public would defeat the ends of justice, (c) if the business concerns the guardianship, custody or maintenance of a minor; (a) the hearing of an interlocutory order, and
 - 4.2.2 s 8 Court Suppression and Non-Publication Orders Act 2010, relevant grounds for making a suppression or non-publication order are: (used to detract from open justice)
 - a) the order is ‘necessary (see *John Fairfax* below) to prevent prejudice to the proper administration of justice’
 - b) the order is ‘necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security’;
 - c) the order is ‘necessary to protect the safety of any person’; (e.g. safety of an informant)
 - d) the order is ‘necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature’; and/or
 - e) ‘it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice’.