

RESOLVING CIVIL

DISPUTES

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Class 1 – Introduction to Dispute Resolution and Civil Procedure

Housekeeping Matters:

- Client Advice Assessment (Group of 3) – Due 17th April
- Mediation Position Paper – Due 15th May

Substantive vs Procedural Law:

- **Substantive Law** – Law that defines legal rights, duties and liabilities
 - Applicable law is the law of the place where the wrongful act was committed
 - EG: Criminal Law, Tort law, Contract Law, Limitation periods
 - Also includes sub-clauses requiring parties to engage in ADR before proceeding to litigation
- **Procedural Law** – The law that governs the conduct of proceedings before the court (Things that make up the process of the court)
 - Used to enforce the substantive rights or claims
 - Does not impact the substantive law itself
 - Formal requirements (EG: Form procedures, evidence, service documents, basic rules of courtrooms)
 - Proof that is needed before court proceedings begin (such as the preliminary assessment establishing a statement of claim/evidence)

Procedural Law:

- Procedural law is ‘rules which are directed to governing or regulating the mode or conduct of court proceedings’ (*McKain v RW Miller & Co*)
- **Purpose of Procedural law** – To provide rules that facilitate dispute resolution and ensure that litigants are afforded procedural fairness and due process
 - Also promotes access to justice, minimalises the issues of cost and delay whilst concurrently promoting the legitimacy of the legal system
 - Brings order to disputes (everyone plays by the same rules) in a manner that will help encourage private resolution
- There are multiple **sources of procedural law** including:
 - *Civil Procedure Act 2005* (NSW)
 - *Uniform Civil Procedure Rules 2005* (NSW)
 - Court Rules – *Supreme Court Rules 1970*, *District Court Rules 1973*, *Local Court Rules 2009*
 - Practice Notes
 - Inherent power of courts to regulate their processes and prevent abuse of process (How the court can protect the best interest of fairness/justice)
- *Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411 - “The Courts have an 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 are examples of abuse of process.
 - Courts will throw out cases that are manifestly unfair to one party
- Abuses of proceedings also occur where the Court's process is employed for an ulterior or improper purpose, or in an improper way, or in a way that would bring the administration of justice into disrepute.
- Procedural laws ensure that the court is sensitive to a wide array of matters

Exercise of Inherent/Implied Powers Limited:

- 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
 - The Local and District Courts have an implied power to do what is required for the effective exercise of their jurisdictions
- *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 – Powers of necessary implication will be called for “whenever they are required for the effective exercise of a jurisdiction but will be confined to so much as can be ‘derived by implication from statutory provisions conferring particular jurisdiction.’”
 - ‘Necessary’ is to be understood as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of specific remedies
 - Necessary does not have the meaning of ‘essential’, rather it is to be ‘subjected to the touchstone of reasonableness’
- Must be something necessary for the court to perform its functions (connected to the powers of the court in some manner) in order for the dispute to go forward

Civil Procedure Act 2005 (NSW) s 56 – Overriding purpose: ← BLANKET SECTION

- (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.

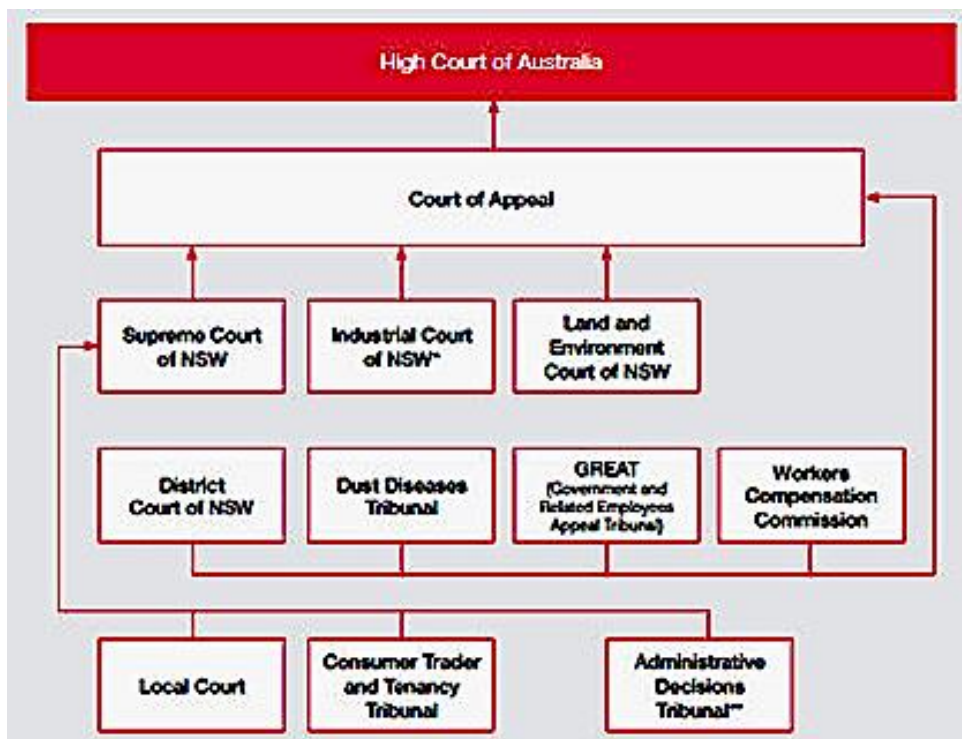
Access to Justice (?):

- Issue – Is true justice really achieved outside the courts??
- Addressing Cost Issues – Alternative Dispute Resolution, Class Actions & Litigation Funding, Maximising Court Efficiency

- Costs are extremely high therefore justice may be sacrificed for the poor if these methods are not partaken in
- Availability of Multiple Dispute Resolution Options – Mediation, Arbitration, Industry Ombudsman
- Anticipation of International Dispute Resolution Issues – Contractual Method of Dispute Resolution and Choice of Law (applicable for cross-border disputes)
- Greater Acceptance and Use of Technology – Can increase court efficiency and provide solutions for victims, but can also increase costs and delays in discovery

Court Structure in NSW:

- Claims are brought to the NSWSC where more than \$750 000 is claimed → Less than \$750 000 = District Court matter
 - District Court also has unlimited jurisdiction for damages for personal injuries arising out of motor vehicle accidents of work injuries
- Claims are brought to the Local court where less than \$100 000 is claimed
 - Claims up to \$10 000 are heard in the Small Claims Division
 - Claims between \$10 000 and \$100 000 are heard in the General division
 - Jurisdictional limit of \$60 000 applies for personal injury or death claims
- The Workers' Compensation Commission also determines disputes concerning workers' compensation claims
- There are also a number of tribunals available to seek redress including Consumer, Trader and Tenancy Tribunal, Guardianship Tribunal, Dust Diseases Tribunal, Mental Health Review Tribunal, Administrative Decisions Tribunal and the Victims Compensation Tribunal



Characteristics of the Australian/Adversarial System

- Party controlled dispute
- Use of precedent, procedural rules and laws of evidence
- Impartial judge acting as an 'umpire'
- Reliance on oral testimony subject to cross-examination
- Distinct pre-trial and trial stages
- Open justice → Includes provision of reasons for decision however may be subject to some limitations
- The provision of reasons is a characteristic of the Australian system as it is believed to be an expression of the open court principle

Basic Steps in Civil Litigation:

- (1) Pre-commencement, (2) Filing and Service of originating process, (3) Defences and Cross-claims, (4) Discovery/Issuance of subpoenas, (5) Filing of Evidence (Affidavits), (6) Trial, (7) Appeal, (8) Enforcement
 - NOTE: ADR can take place at any time as can tactical decision regarding security for costs and offers of compromise

Class 2 - Case Management

Case Management:

- Case management arose as a response to the twin evils of delay and excessive costs that could arise from leaving the control of litigation in the hand of the parties without judicial supervision
 - The traditional adversary approach no longer applies to civil litigation in NSW
- Management of cases by the court is required in all civil proceedings in NSW
 - As seen in Civil Procedure Act (CPA) s 5c and Uniform Civil Procedure Rules (UCPR) Part 2-3
 - Judges get involved in proceedings at the onset on proceedings in order to facilitate the parties coming together to allow for a quick resolution
 - Judges are no longer passive recipients of their caseloads!
 - 'Managerial judging' – The judge is required to take an active part in directing the proceedings through its interlocutory stages
- In the past case management has been largely left to the parties to prepare for trial and to seek the court's assistance as required. These times are long gone (*Aon Risk Services Australia Ltd v Australian National University*)
- Registrar has increased powers under the case management scheme to ensure that the delay in resolving disputes is minimalised
 - Key objective to resolve delay has been to promote trial date certainty

Dangers of Trial Delays: 'Justice Delayed is justice denied':

- Witnesses forgetting events
- Evidence/records becoming lost
- Increasing costs. The dangers of increased costs include:
 - Hampers access to justice
 - Can be used as a tactical weapon by better resourced parties
 - Lawyers may be incentivised to bill more hours
 - Costs can include parties' time spent in consultation with attorneys and time spent in court or as witnessed
- Backlog of cases in the courts... Was partially resolved by increasing the jurisdiction of the DC + LC, appointing more judges (some in an acting capacity) and advocating for arbitration to resolve disputes
- Litigants left without resolution

The Problem of Case Management and Costs:

- Case management can increase costs higher than before introduction of case management → Can make the problem worse as the process may increase costs
- Case management can frontload costs that would not have been imposed if a case had been settled at an early stage
- Case management may need to develop to limit the number of conferences/hearings scheduled at the outset of a litigation or use technology to make them more efficient

- Courts must ensure that costs are proportionate to the amount in dispute

Legislation concerning case management:

Civil Procedure Act 2005 (NSW) s 56 – Overriding purpose:

- (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.

Federal Court of Australia Act 1976 (Cth) s 37M – Overarching purpose of civil practice and procedure provisions:

- (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible

Federal Court of Australia Act 1976 (Cth) s 37N - Parties to act consistently with the overarching purpose:

- (1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.
- (2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:
 - (a) take account of the duty imposed on the party by subsection (1); and
 - (b) assist the party to comply with the duty.

Case Management in NSW Courts:

- Each court has its own systems for case management, set out in Practice Notes
 - EG: District Court's procedures are set out in Practice Note DC (Civil) No. 1
 - Court aims to have cases completed within 12 months of commencement
 - Plaintiffs must not commence proceedings until they are prepared to proceed → Preparation for trial must be well advanced
 - The above mentioned are part of the General List, however other lists (such as commercial, construction and defamation) deal with specific matters
- The Supreme Court also has lists explaining the case management procedures for different subject matter (EG: Possession List, Administrative List, Criminal Law List)

Supreme Court of NSW General Case Management List:

- Applies to all active proceedings commenced by statement of claim (that are not on other Supreme Court Lists)
- Proceedings in the list will generally be managed by way of Directions Hearings conducted by a Judge or Registrar

- First Directions Hearing to be scheduled approximately 3 months after proceedings commenced → Intention is for parties to be well prepared for hearing
 - Parties must get together in these 3 months to talk about the dispute
- Parties legal representatives **are to have met** prior to first Directions Hearing to: narrow issues and identify matters of agreement; agree on suitable interlocutory orders, directions or arrangements; prepare a draft timetable for future management of proceedings; prepare draft short minutes of any orders sought; and discuss the possibility of settling the dispute by ADR

Directions Hearing in Common Law General Case Management List:

- The Purpose of a Directions Hearing is to ensure the **just, quick and cheap disposition** of proceedings in accordance with the overriding purpose set out in section 56 CPA
- Tasks at a Directions Hearing:
 - Consider whether proceedings should be heard in the District Court
 - Define matters in issue
 - Direct that party/parties serve/file witness statements to facilitate clarification of issues and negotiations for settlement
 - Consider whether ADR is suitable
 - Make consent orders for the completion at earliest possible time of interlocutory steps such as discovery, interrogatories, views, medical examinations and expert reports
 - Direct that party/parties serve/file statement of damages to facilitate resolution of disputes over damages and negotiations for settlement

Judges Role in Case Management:

- Judge is able to control the case by making directions and setting timetables
- Role can be performed by registrar of list judge depending on the court, the list and complexity of individual case
- Tension arises where priorities between case management objectives and issues of justice come into conflict:
 - “Justice is the paramount consideration in applications such as [Queensland’s seeking leave to amend pleadings]. Case management . . . should **not have been allowed to prevail over the injustice of shutting the applicants out** from raising an arguable defence, thus precluding the determination of an issue between the parties.” (*Queensland v JL Holdings Pty Ltd* (1997) CLR 146)
 - Justice is the highest priority! (However the HCA in *AON Risk Services v ANU* somewhat eroded this principle)

Implementing the Overriding Purpose (s 56):

- The practical effect of the below-mentioned sections is to emphasises that the courts are required to give effect to the overriding purpose of CPA s 56

s 57 – Objects of Case Management: ← HOW THE COURT IMPLEMENTS S 56

- (1) For the purpose of *furthering the overriding purpose* referred to in s 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

s 58 – Court to Follow dictates of justice:

- (1) In deciding:
 - (a) Whether to make any order or direction for the management of proceedings, including:
 - (i) any order for the amendment of a document, and
 - (ii) any order granting an adjournment or stay of proceedings, and
 - (iii) any other order of a procedural nature, and
 - (iv) any direction under Division 2 [power of court to give directions], and
 - (b) the terms in which any such order or direction is to be made, the court must seek to act in accordance with the **dictates of justice**.
- (2) For the purpose of *determining what are the dictates of justice* in a particular case, the court:
 - (a) must have regard to the provisions of sections 56 and 57, ← **ISSUE** - What is just therefore must appreciate efficiency and saving costs
 - (b) may have regard to the following matters to the extent to which it considers them relevant:
 - (i) the **degree of difficulty or complexity** to which the issues in the proceedings give rise
 - (iv) the degree to which the respective **parties have fulfilled their duties** under section 56(3)
 - (vi) the **degree of injustice that would be suffered** by the respective parties as a consequence of any order or direction
 - (vii) **any such other matters** as the court considers relevant in the circumstances of the case

s 59 – Elimination of Delay:

In any proceedings, the practice and procedure of the court should be implemented with the **object of eliminating any lapse of time between the commencement of the proceedings and their final determination beyond that 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.

s 60 – Proportionality of Costs:

In any proceedings, the practice and procedure of the court should be implemented 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 61 – Directions as to Practice and Procedure and Generally:

- (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.
- (2) In particular, the court may, by order, do any one or more of the following:
 - (a) it may **direct any party to proceedings to take specified steps** in relation to the proceedings,
 - (b) it may **direct the parties to proceedings as to the time within which specified steps** in the proceedings must be completed,
 - (c) it may give such **other directions** with respect to the conduct of proceedings as it considers appropriate.
- (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**

s 62 – Directions as to conduct of hearing:

- (1) The court may, by order, **give directions as to the conduct of any hearing**, including directions as to the order in which evidence is to be given and addresses made.
- (2) The court may, by order, give directions as to the order in which questions of fact are to be tried.
- (3) Without limiting subsections (1) and (2), the court may, by order, give any of the following directions at any time before or during a hearing:
 - (a) a direction limiting the time that may be taken in the examination, cross-examination or re-examination of a witness,

- (b) a direction limiting the number of witnesses (including expert witnesses) that a party may call
- (c) a direction limiting the number of documents that a party may tender into evidence
- (d) a direction limiting the time that may be taken in making any oral submissions

(4) A direction under this section must not detract from the principle that each party is entitled to a fair hearing and must be given a reasonable opportunity:

- (a) to lead evidence, and
- (b) to make submissions, and
- (c) to present a case, and
- (d) at trial, other than a trial before a Local Court sitting in its Small Claims Division, to cross-examine witnesses

(5) In deciding whether to make a direction under this section, the court may have regard to the following matters in addition to any matters that the court considers relevant:

- (a) the subject-matter, and the complexity or simplicity, of the case,
- (b) the number of witnesses to be called,
- (c) the volume and character of the evidence to be led,
- (d) the need to place a reasonable limit on the time allowed for any hearing
- (e) the efficient administration of court lists
- (g) the costs that are likely to be incurred by the parties compared with the quantum of the subject-matter in dispute

s 63 – Directions with respect to procedural irregularities:

(1) This section applies to proceedings in connection with which there is, by reason of anything done or omitted to be done, a failure to comply with any requirement of this Act or of rules of court, whether in respect to a time, place, manner, form or content or in any other respect.

(2) Such a failure:

- (a) is to be treated as an irregularity, and
- (b) subject to subsection (3), does not invalidate the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings.

(3) The court may do either or both of the following in respect of proceedings the subject of a failure referred to in subsection (1):

- (a) it may, by order, set aside the proceedings, any step taken in the proceedings or any document, judgment or order in the proceedings, either wholly or in part
- (b) it may exercise its powers to allow amendments and to make orders dealing with the proceedings generally

(4) The court may not take action of the kind referred to in subsection (3)(a) on the application of any party unless the application is made within a reasonable time and, in any case, before the party takes any fresh step in the proceedings after becoming aware of the failure.

UCPR Rules for Directions – 2.1 Directions and Orders:

The court may, at any time and from time to time, **give such directions and make such orders for the conduct of proceedings as appear convenient** (whether or not inconsistent with these rules of any other rules of court) for the **just, quick and cheap disposal** of the proceedings

→ The power is not confined just to speedy determinations, but gives the court the power to make any order that is going to facilitate the case management objectives (Sackville AJA in *McGuirk v UNSW* [2010] NSWCA 104

UCPR Rules for Directions – 2.2 Appointment for hearing:

The court may, at any time and from time to time, of its own motion, **appoint a date for a hearing** at which it may give or make the directions or orders referred to in rule 2.1

UCPR Rule 2.3 – Case Management by the Court:

Without limiting the generality of rule 2.1, directions and orders may relate to any of the following:

- (a) the filing of pleadings,
- (b) the defining of issues, including requiring the parties, or their legal practitioners, to exchange memoranda in order to clarify questions,
- (c) the provision of any essential particulars,
- (d) the filing of “Scott Schedules” [in building or technical cases] referred to in rule 15.2,
- (e) the making of admissions,
- (f) the filing of lists of documents, either generally or with respect to specific matters,
- (g) the delivery or exchange of experts’ reports and the holding of conferences of experts,
- (h) the provision of copies of documents, including their provision in electronic form,
- (i) the administration of answering interrogatories, either generally or with respect to specific matters,
- (j) the service and filing of affidavits, witness statements or other documents to be relied on,
- (k) the giving of evidence at any hearing . . .
- (l) the use of telephone or video conference facilities . . . and other technology,
- (m) the provision of evidence in support of an application for an adjournment or amendment,
- (n) a time table with respect to any matters to be dealt with . . .
- (o) the filing of written submissions

***Hans Pet Constructions Pty Ltd v Cassar* [2005] NSWCA 230:**

- **Facts** – Judge gave direction to the two parties indicating that the two parties must serve their evidence to the other party pre-trial. Hans Pet gave the evidence to Cassar so close to the deadline that they did not have time to prepare a case. Cassar therefore turned up to the hearing unprepared claiming that they had the right to additional time to prepare a case
 - The Cassar's argument was rejected by the trial judge however they won on appeal
- **Issue** – Was the Magistrate's decision to strike out Cassar's claim (following their inability to meet the deadline) appropriate? **NO**
- **Decision** - Where . . . a party is to be prejudiced irretrievably in the conduct of its litigation by the failure to comply with a timetable it will rarely be appropriate so to affect the party without an investigation and a conclusion that it was the party involved who was at least in part responsible for the default, so as to justify such an irretrievable prejudice.
 - **Held** that the Magistrate had failed to account for the interests of justice (as per s 57), therefore the initial striking out of Cassar's defence was unlawful
 - The actions of Hans Pet (in not following their deadline) influenced Cassar, therefore justice required that the decision be overturned
 - s 57, concerning the overriding purpose, (and concurrently s 56) must be acknowledged in all situations!
- Proper consideration must be given to all factors identified in the *Civil Procedure Act* when determining what the fair and just outcome is to be!
- Magistrate's decision was overturned due to the lack of evidence indicating that he considered s 57 upon evaluating what the just response to the claimants want of more time should be

***Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372:**

- **Facts** – In an insurance claim, Lumley Insurance Company had some information which was confidential. That information was not provided to Halpin, however Halpin claimed that the Insurance Company should be required to disclose the information
 - Decision was made that the confidential documents need not be disclosed
- **Issue** – Was the decision to allow the information to be withheld valid?
- **Decision** – 'The Court is entitled, and in appropriate cases obliged, to interfere and give directions to ensure that the broader objects of case management within the court are effected'
 - Judicial discretion in managing cases is necessary... In this case the broader objectives of case management were held to be considered and the order to keep the information confidential was valid
 - The overarching purpose (s 56) trumps any other inconsistent purpose

- **Held** - It is clear that the court has wide powers to make directions for the conduct of proceedings, including directions relating to the disclosure or withholding of affidavits or reports on which a party intends to rely at a hearing
 - If the court considers that an order permitting one party to withhold affidavit or other material from the other party pending the trial is likely to assist in the speedy determination of the real issues between the parties (*CPA* s 61) or is likely to advance the just, quick and cheap disposal of the proceedings (*UCPR* r 2.1), it has the power to make the order.
- Essentially the court has the powers to make any order which it likes however, it must do so with consideration of s 56, 57, 58, 59 and 60
 - Court should be transparent in its decision making process to easy recognition that the balancing process was undertaken to ensure the overriding purpose in s 56 was considered
 - A decision in a particular case is likely to require a weighing of multiple considerations that will not always reconcile
 - The judicial choice regarding what is the just decision is under less scrutiny that the process that is undertaken to reach that decision

Aon Risk Services Australia Ltd v ANU [2009] HCA 27:

- **Facts** – ANU commenced proceedings against 3 insurers (including Aon) claiming an indemnity for losses it had suffered by reason of the destruction or damage to buildings at one of its complex
 - On the 3rd day a settlement was reached with the insurers however an adjournment + application of leave was sought to add a new claim against Aon
- **Decision** – Case somewhat overturns the decision made in *JL Holdings* → Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings
 - What is a ‘just’ decision is to be understood in the light of the purposes and objectives stated
 - Efficiency, speed and costs savings are all to be considered in the case management process when attempting to reach a ‘just’ resolution

Expense Reduction Analysts v Armstrong [2013] HCA 46:

- Case concerned whether a party who had accidentally turned over a document and revealed information should be allowed to overturn this mistake
 - Held that they should be allowed to overturn the mistake and have the inadvertent disclosure overturned
- **Held** - It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose
 - The powers of the court are not at large & are not to be exercised according to a judge's individualistic idea of what is fair in a given circumstance

- The focus is upon facilitating a just, quick and cheap resolution of the real issues in the proceedings, although not at all costs. The terms of the *CPA* assume that its purpose, to a large extent, will coincide with the dictates of justice.
 - The CPA requires the courts to take into account multiple considerations and make an overall decision concerning what weight should be given to each of the objectives mentioned in legislation

***Provident Capital Ltd v Naumovski* [2011] NSWSC 270: ← Summary of Case Management**

The decision [in *Aon Risk*] refers specifically to the context of the Rules of the Supreme Court of the Australian Capital Territory. However, it has broader application. From it, in its application to the statutory context of proceedings in NSW, I derive the following principles:

- (a) the **overriding purpose** of s 56 of the *CPA* reflects the principles of case management by the court of proceedings which invoke the court's jurisdiction;
- (b) the achievement of the overriding purpose has a beneficial effect upon the court and all other litigants;
- (c) all parties, individuals and corporations are subject to the strain imposed by, and the pressures of, litigation. **The ill effects of delay on all parties are to be recognised;**
- (d) there is **no entitlement** for a party, subject to payment of costs by way of compensation, to amend the pleading, or **obtain an extension of time** within which to file a pleading;
- (e) **all matters**, including concerns of case management, which are relevant to the exercise of the power in question, **should be weighed and ultimately the interests of justice**, which include the broader concerns identified by case management, **are to prevail.**

Class 3 – Jurisdiction, Limitation Periods & Preliminary Discovery

Jurisdiction:

- Before court proceedings can be commenced, a prospective plaintiff will need to consider whether the court in which it is proposed to commence proceedings has jurisdiction to hear the case

Jurisdictional Cross-Vesting:

- Jurisdictional cross-vesting is authorised by legislation – *Jurisdiction of Courts (Cross Vesting) Act 1987 (Cth)* + *Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW)*
 - Ensures that multiple matters can be heard at once → Transfers the jurisdiction to a different court
- Commonwealth Act confers jurisdiction on state courts (s 4)... State courts have concurrent jurisdiction with the Federal Court
 - Federal claims can be transferred to State Courts... Can only go from Federal to State (**not visa-a-versa**) as it has been found to be unconstitutional to vest State jurisdiction in the Federal Court
- State Act cross-vests State jurisdiction among State courts (s 4)
 - Also allows for transfers of proceedings between courts participating in the scheme (s 5)
 - Transferee court will be the most appropriate court and both transferring and transferee court must have jurisdiction
 - Transferring court also considers interests of justice
- Cross-Vesting occurs where there are multiple elements to a claim (both state and federal claims are asserted)

***BHP Billiton Ltd v Schultz* [2004] HCA 61:**

- **Issue** – Whether a matter should be transferred out of the NSW Dust & Diseases Tribunal to the Supreme Court of SA
 - Originally denied by the NSWSC, matter taken to the HCA to get some aspects of the Cross-vesting Act interpreted
- **Held** - There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised
 - 1st court doesn't have to be 'clearly inappropriate' → It is both necessary and sufficient that, in the interests of justice, the 2nd court is **more appropriate**
 - Weighing considerations of cost, expense and convenience is a familiar aspect of the kind of case management involved in many cross-vesting applications
 - A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action
- The idea that a plaintiff's choice [of forum] is not lightly to be overridden echoes the statement of Scott LJ in *St Pierre* that a right of access to a court must not be lightly refused

- **Decision** – The interests of justice dictated that the Supreme Court of South Australia was the appropriate forum and the proceedings should be transferred to the SASC

Transfer Pursuant to the Cross-Vesting Act:

- Deference/regard should not automatically be given to the plaintiff's choice of forum when determining transfer applications
- Factors that may be considered include:
 - The place where the parties and/or witnesses reside or carry on business
 - The location of the subject matter of the dispute
 - The importance of local knowledge to the resolution of the issues
 - The law governing relevant transactions
 - The procedures available in the different courts
 - The likely hearing dates in the different courts
 - Whether it is sought to transfer the proceedings to a specialised court with specialised knowledge, *i.e.* the Family Court, Dust & Diseases Tribunal

Limitation Periods:

- Limitation periods establish the time within which a claim must be brought or else it is forfeited
- In NSW, if more than one cause of action is pleaded, the applicable limitation period is the earliest (*Limitations Act 1969 s 13*)
- Each individual claim will have a differential starting date → Check legislation!
- Rationale for having limitation periods:
 - To avoid prejudices that can result from delay, such as lost evidence
 - To avoid oppressing future defendants with potential claims that never go away... Frees them of the stress of the past coming back to hurt them
 - To allow resources that may be allocated with a potential action in mind to be freed
 - Public interest requires that disputes be settled as quickly as possible
- Certain limitation periods may be postponed (*ss 52-56 Limitations Act*) → Such as fraud restricting the possibility of a plaintiff discovery a cause of action
- Certain limitation periods may also be extended (*s 56A Limitations Act* – Relating to defamation)
- Limitation periods are substantive rather than procedural law, so they are governed by the law that covers the cause of action
 - “Matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.” *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36 at [99].

***Brisbane South Regional Health Authority v Taylor* [1996] HCA 186:**

- McHugh J - A limitation period should not be seen as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. *It represents*

the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated."

- Limitation periods exist as the time which is spent waiting for a claim has a positive correlation with unfairness
- The general rule that action must be commenced within the limitation period should prevail once the defendant has proved the fact or the real possibility of significant prejudice

Limitations Act 1969 (NSW):

<u>Cause of Action</u>	<u>Period</u>
Contract	s 14(1)(a): 6 years from the date on which the cause of action accrues to the plaintiff (<i>i.e.</i> the date of breach)
Tort	s 14(1)(b): 6 years from the date on which the cause of action accrues to the plaintiff
Defamation	s 14B: 1 year from the date of publication of the matter complained of
Judgment	s 17: 12 years from the date on which the judgment first becomes enforceable
Recovery of Land	s 27(2): 12 years from the date on which the cause of action accrues to the plaintiff
Breach of Trust	s 48: 6 years from the date on which the cause of action accrues to the plaintiff
Personal Injury	s 18A for claims prior to Dec. 6, 2002 – 3 years from the date of injury s 50C for claims on or after Dec. 6, 2002 – 3 years from the date of discovery

Preliminary Discovery:

- Allows a prospective plaintiff to apply for an order to obtain information about a prospective defendant prior to the commencement of proceedings
 - Information can be ordered that could assist a party to determine whether they should commence and action
 - Order for preliminary discover sought by filing a summons with a supporting affidavit that (a) addresses the requirements of particular rules (reasonable inquiries + information sought will assist) and (b) is personally served
- Purposes for preliminary discovery:
 - To ascertain a prospective defendant's identity or whereabouts
 - Includes the name and (as applicable) the place of residence, registered office, place of business or other whereabouts, and the occupation and sex of the person against whom the applicant desires to bring proceedings, and also whether that person is an individual or a corporation (*see UCPR r 5.1*)

- To receive documents from a prospective defendant or other party to assist the prospective plaintiff in determining whether to commence proceedings (not in regards to the existence of a cause of action)
- There are provisions in the UCPR that deal with the payment of costs to persons who are required to provide information or those who are required to testify under the UCPR rules
 - Costs are to be paid to any person who incurs them in compliance with a preliminary discovery
- There is no obligation to give up confidential documents!

Requirements for Preliminary Discovery about or from a Prospective Defendant:

- A reasonable inquiry by the person seeking preliminary discovery
- Person or defendant that may have or may have had information or documents
- Filing of summons (or notice of motion if proceedings commenced)
- Affidavit stating facts on which applicant relies and specifying kinds of information, documents or things in respect of which the order is sought
- Court order
- Personal service of order and copy of supporting affidavit (actually give to them)

UCPR r 5.2: Discover to ascertain prospective defendant's identity or whereabouts:

(1) This rule applies if it appears to the court that:

- (a) the applicant, **having made reasonable inquiries, is unable to sufficiently ascertain** the identity or whereabouts of a person ("the person concerned") for the purpose of commencing proceedings against the person, and
- (b) some person other than the applicant ("the other person") **may have information, or may have or have had possession of a document or thing, that tends to assist** in ascertaining the identity or whereabouts of the person concerned.

(2) The court may make either or both of the following **orders** against the other person:

- (a) an order that the other person attend the court to be examined as to the identity or whereabouts of the person concerned,
- (b) an order that the other person must give discovery to the applicant of all documents that are or have been in the other person's possession and that relate to the identity or whereabouts of the person concerned.

(3) A court that makes an order for examination under subrule (2)(a) may also make either or both of the following **orders**:

- (a) an order that the other person must produce to the court on the examination any document or thing that is in the other person's possession and that relates to the identity or whereabouts of the person concerned,
- (b) an order that the examination be held before a registrar.

(4) An order under this rule with respect to any information, document or thing held by a corporation may be **addressed to any appropriate officer or former officer of the corporation**.

(7) Unless the court orders otherwise, an application for an order under this rule:

- (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of information, documents or things in respect of which the order is sought, and
- (b) must, together with a copy of the supporting affidavit, be served personally on the other person.

Roads & Traffic Authority of NSW v Australian National Car Parks Pty Ltd [2007] NSWCA:

- **Facts** – The Australian National Carpark were attempting to sue 294 people for failing to pay for parking in a carpark (breach of contract). They sought preliminary discovery from the RTA for the registration details of these vehicles
 - RTA objected, claiming that registration does not automatically align with the person who was driving the car at the time. The RTA also contented that reasonable inquiries were not made
- **Issue** – Could preliminary discovery be provided despite claims that information was of no use and reasonable inquiries were not conducted?
 - What does reasonable inquiries actually mean?
- **Decision** – The preliminary discovery rule contains threshold requirements. But, subject to them, an order rests upon the favourable exercise of a judicial discretion
 - What is ‘reasonable’ depends on the facts and circumstances of the actual subjective case at hand
- The words “*may*” and “*tends to assist*” in r 5.2(1) show that the applicant **does not** have to establish in advance that the desired information, document or thing will necessarily reveal the identity or whereabouts of the prospective defendant
 - The information document or thing does not need to be the last piece in a jigsaw puzzle → No need to show that the information will actually assist!
 - Information assists in this case as it allows for further inquiries to ascertain the identity of those who did not pay for parking
 - Discovery in this case tended to assist in that endeavour because it gave information which then led to other steps to be taken to identify the person concerned. I see no error in this approach on the particular facts.
 - Discovery valid as it was appropriate in allowing further and better particulars be taken to ascertaining the drivers who failed to pay for parking
 - The information sought to be discovered need not be conclusive to a positive finding that there is a case against any individual
- In seeking preliminary discovery it must be proven (and put to the court in an affidavit) that **(1)** Reasonable inquiries have been made to ascertain information, **(2)** The information would be of assistance in ascertaining the identity of prospective defendants

UCPR r 5.3: Discover of documents from prospective defendant:

(1) If it appears to the court that:

- (a) the applicant may be entitled to make a claim for relief from the court against a person (“the prospective defendant”) but, having made **reasonable inquiries**, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant, and
- (b) the prospective defendant may have or have had possession of a document or thing that can **assist in determining whether or not the applicant is entitled to make such a claim for relief**, and
- (c) inspection of such a document **would assist the applicant** to make the decision concerned,

the court **may order that the prospective defendant must give discovery** to the applicant of all documents that are or have been in the person’s possession and that relate to the question of whether or not the applicant is entitled to make a claim for relief.

NOTE: (a), (b) and (c) must be proven to have occurred in the affidavit to the court

(2) An order under this rule with respect to any document held by a corporation may be addressed to any officer or former officer of the corporation.

(3) Unless the court orders otherwise, an application for an order under this rule:

- (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought, and
- (b) must, together with a copy of the supporting affidavit, be served personally on the person to whom it is addressed.

UCPR r 5.4: Discover of documents from other persons:

(1) The court may order that a **person who is not a party to proceedings**, but in respect of whom it appears to the court that the person may have or have had possession of a document that relates to any question in the proceedings, must give discovery to the applicant of all documents that are or have been in the person’s possession and that relate to that question.

(2) Unless the court orders otherwise, an application for an order under this rule:

- (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought, and
- (b) must, together with a copy of the supporting affidavit, be served personally on the person to whom it is addressed.

Panasonic Australia v Ngage Pty Ltd [2006] NSWSC 399:

- **Facts** – Panasonic entered into a confidentiality agreement with Ngage (3rd party contractor buying screens for Westfield malls) to supply plasma screens for Westfield shopping centres
 - Ngage entered into a memorandum of understanding where it represented an intention to purchase plasma screens

- This agreement fell through, they contracted with LG to provide the screens
 - Panasonic had suspicions that Ngage may have been colluding with LG in breach of confidence or breach of the TPA therefore they sought preliminary discovery to figure out if they had a claim against Ngage
 - Court initially entered an order for \$50 000 security for costs to cover the costs involved in providing the documents for preliminary discovery
- **Decision** - All the plaintiff need show is that the contemplated proceedings are likely to rest on some recognised legal ground and does not necessarily need to show a prima facie or pleadable case so long as there is **reasonable cause to believe that the applicant may have a right to relief in the court**
 - This section not only covers evidence required to prove a cause of action by also covers material as to the possible worth of the prospective defendant
 - This is allowed to predict the worth of a suit... No point suing if the prospective defendant has nothing that is of value
 - One looks to see if there is reasonable cause to believe that the applicant *may* have a right of action against the respondent
- It seems to me that the rule sets out a series of circumstances where as a matter of policy the plaintiff is given some right to obtain information
 - In a case where the defendant does not appear to contest the order and puts forward no such material then it would seem to me to be seldom that the court would refuse its discretion to make an order where the plaintiff has demonstrated a need
 - Court should freely give an order if they have complied with the requirements set out in the UCPR rules (reasonable inquiries have been made + person has information that could be of assistance)
- Reasonable costs for preparing the list of documents and for supervising inspection should be charged if a preliminary discovery order is given
- **TEST** – Preliminary discovery awarded where there is reasonable cause to believe that an applicant may have a right of action

Hatfield v TCN Channel Nine [2010] NSWCA 69:

- **Facts** – A NSW detective was trying to obtain preliminary discovery due to the possibility/likelihood that she would be defamed in the TV series Underbelly (her claims were founded on the Underbelly books)
- **LAW** – The court set out a list of considerations that are to be undertaken when looking at applications for preliminary discovery
 - First, In order for it to “appear” to the Court that the applicant “may be entitled” to make a claim for relief, it is **not necessary for the applicant to show a prima facie or pleadable case**
 - Secondly, while the mere assertion of a case is insufficient . . . **It will be sufficient if there is reasonable cause to believe** that the applicant may have a right of action against the respondent resting on some recognised legal ground.

- Thirdly, **belief requires more than mere assertion and more than suspicion or conjecture.**
- Fourthly, the requirement that the matters set out in UCPR 5.3 “appear[s]” to the court to establish an entitlement to an order under the rule may be **wider than a reasonable cause to believe”:**
- Fifthly, the question posed by [UCPR 5.3(1)(a)] . . . is not whether the applicant has sufficient information to decide if a cause of action is available against the prospective respondent [but] . . . **whether the applicant has sufficient information to make a decision whether to commence proceedings**
 - An applicant may be entitled to preliminary discovery in order to establish what defences are available → Defence may defeat a claim
- Sixthly, the Rule is to be beneficially construed, **given the fullest scope that its language will reasonably allow, with the proper brake on any excesses lying in the discretion of the Court**, exercised in the particular circumstances of each case.
- ‘What constitutes reasonable inquiries’ is a question of fact, to be considered in all the circumstances of the particular case, which includes the relationship between the applicant and the prospective defendant
- **Decision** – The evidence rose above the level of a mere assertion... It was reasonably capable of inclining the mind towards the fact that the appellant may have a claim for relief
 - The ideal of freedom of expression and the potential impossibility of proving defamation (due to the notorious personality of the applicant) led to the court rejecting the application
 - Discovery denied as it would have placed unreasonable limits on the freedom of expression
 - Ultimately the preliminary discovery was not awarded... Hatfield did later win an suit for defamation years later