**TOPIC ONE – Process, Open Justice and Fairness**

**Procedural Law**

- Procedural law is the rules which are directed to governing or regulating the mode or conduct of court proceedings: *McKain v R W Miller & Co (SA) (1991)*
- Regulates the way in which substantive rights and obligations are claimed and enforced
- Purpose of procedural law is to guarantee procedural fairness, achieve accuracy in decision making, enforcement of substantive rights, critical to the perception of fairness, can be used to address problems of cost, complexity and delay
- Rule of law is put into action through the acts of individuals exercising discretion
  - Discretion: making a decision when faced between two or more alternatives
  - Ethical rules designed to guide lawyers in the choices they make when representing clients
- Function of procedural law is to produce civil order
- *Civil Procedure Act section 56* – guiding principle for procedure: facilitate the just, quick and cheap resolution of the real issues in the proceedings

**Adversarial Model of Litigation**

- Main features:
  a) Party controlled dispute (parties define the dispute and present evidence and argument)
  b) Use of precedent, procedural rules and laws of evidence
  c) A reactive, impartial judge who acts as umpire
  d) Reliance on oral testimony adduced from witnesses and subject to cross-examination
  e) Trial is the climactic end of the litigation process, as distinct for the pre-trial stages of proceedings

- Commonly contrasted to the inquisitorial model:
  a) The judge’s role is both proactive and inquisitive
  b) Main sources of law are codes with commentary from legal scholars
  c) There are minimal rules of courtroom practice
  d) Emphasis on documentary proof and not cross-examination
  e) No rigid separation between trial and pre-trial phases

**Reforms of the Adversarial System**

- Criticism of the adversarial model on the grounds it prevents access to justice due to its cost and delay
- Unjust, unequal and producing inaccurate results
- Lord Woolf reviewed the adversarial system, recommended:
  - Early settlement of disputes
  - Greater use of alternative dispute resolution
  - Single expert witnesses
  - Encouraging cooperation amongst lawyers
  - Identification and reduction of issues as a basis for case preparation
  - Moving to trial as quickly as possible
  - Use of overriding objectives in court rules

**Inherent and Implied Jurisdiction**

- Inherent power in superior courts of record to regulate their processes and prevent an abuse of process – *Jago v District Court of New South Wales*
- The District and Local courts have limited jurisdiction which arises expressly under statute or is derived by implication from statutory provisions conferring particular jurisdiction – *Grassby v R*
- 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*
- There is an implied power to do that which is required for the effective exercise of its jurisdiction – *TKWJ v The Queen*
Civil Procedure Themes

Balancing Competing Objectives
[NB: These objectives are not always competing]

- Open justice and fair trial
- Tension between efficiency (cost and delay reduction) and justice
- Access to justice and the role of litigation in society
- The role of judicial discretion in managing cases

Perceived Problems with Civil Procedure

- Cost
  - The way lawyers charge for their services, encourages lawyers to complicate litigation to increase revenue
  - Excessive costs may hamper access to justice
  - May be used as a tactical weapon to force a party with fewer resources to discontinue proceedings or accept a lesser settlement
  - Case management is a tool which attempts to minimise costs
- Delay
- Lack of access (usually due to cost and delay)
- Uncertainty
- Unfairness
- Excessive complexity

Open Justice

- Spigelman in John Fairfax Publications Pty Ltd v District Court of NSW: “Open justice is one of the most fundamental aspects of the system of justice in Australia...no inherent power of the court to exclude the public”
- Accountability and legitimacy
- R v Richards & Bijkerk: “Publicity of proceedings is one of the great protections against the exercise of arbitrary power”

The court can depart from the principle of open justice in various ways

- The court can close the court to the public (s 71 Civil Procedure Act) “if the presence of the public would defeat the ends of justice” (s 71(b)) or in cases concerning the guardianship, custody or maintenance of a minor (s 71(c))
- Prohibit publication of all or part of the proceedings (Court Suppression and Non-Publication Orders Act 2010)
- Restrict access to confidential information by suppression order (Seven Network Limited & Ors v James Warburton [2011])
- Pseudonym orders – real name not used in reporting, no photos or filming: Witness v Warsden (2000)
- Common law test: A court can only depart from this 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...if it is necessary to secure the proper administration of justice in proceedings before it...must do no more than is necessary to achieve the due administration of justice: McHugh JA in John Fairfax & Sons Pty Ltd v Police Tribunal of NSW (1986)
- Test of necessity does not mean ‘convenient, reasonable or sensible’ must be really necessary: Hogan v Australian Crime Commission (2010)
- Common law exceptions: protect informers, protect national security, blackmail and extortion cases

Hogan v Hinch (2011)

- Facts: Hinch (radio broadcaster) violated a suppression order – people were released from prison under Serious Sex Offenders Monitoring Act, identities and addresses were suppressed – Hinch broadcast the names of these people – argued the suppression order diminished the integrity of the courts and was unconstitutional
- Hinch’s conduct deliberately frustrated the effect of an order, limiting the ability of the court to act effectively – normally can’t bind a non-party to the original proceedings
- Power to make suppression orders was not incompatible with Chapter 3 of the Constitution – it may be in the public interest to grant suppression orders to ensure justice is done
**Rinehart v Rinehart (2014)**
- Facts: Gina Rinehart having a dispute with her children over a trust fund – question for the court was whether a suppression order was necessary to prevent the administration of justice over Gina’s alleged mismanagement of their trust fund
- Gina’s argument: real risk of commercial harm if order was refused, potential investors may decline to deal with her/her company
- Held: parties have to accept the potential for damage to their reputation and consequential loss – therefore, no suppression order
- A lot of the information as already in the public domain
- Sophisticated investors would be able to read the statement of claim and decide whether the allegations had any basis

**Fair Trial**
- Courts have an overriding duty to maintain public confidence in the administration of justice
- The function of providing proper notice is fundamental to the basic requirement of procedural fairness
- What constitutes a fair trial may be complex in any given circumstance
- Elements
  - Obey natural justice
  - Fair notice
  - Onus of proof

Spigelman, “The truth can cost too much: the principle of a fair trial”
- Principle of a fair trial is reflected in numerous rules and practices
- The High Court has, over about 15 years, given the principle of a fair trial considerable emphasis and elaboration
- More properly a principle than a right (inherently flexible, not a constitutional right in Australia)

**Stead v State Government Insurance Commission**
- Facts: action for negligence arising out of a motor accident – whether the accident was a cause or a material factor in the applicant developing a neurotic condition was a major issue at the trial – defendant relied on an expert report which the plaintiff argued should be ignored – judge accepted the expert report – plaintiff appealed to the High Court
- Appeal allowed
- Difficult for a court of appeal to assess a witness testimony – this was an issue suitable for determination by the primary judge
- Appeals are designed to consider whether a re-trial would result in a different outcome

**Mastronardi v NSW**
- Facts: Mastronardi was a prisoner and was seriously assaulted in his cell by fellow prisoners – assaulted because he was recognised as a former security guard – proceedings against the State of NSW for failing to provide protection against a threat of physical attack – claim rejected – appealed
- Issue: whether some substantial wrong or miscarriage had thereby been occasioned to allow for the ordering of a new trial pursuant to UCPPR 51.53
- Held: appellant did not have a trial untainted by material factual errors, he can properly complain he has not had his case considered according to law
- Substantial miscarriage of justice is not limited to an assessment of the ultimate outcome (not in the power of the Court of Appeal to make such an assessment)

**Crown as the Model Litigant**
- Lawyers acting for the government are required to ensure their client acts as a model litigant
- The court expects the Crown to pursue the public interest when it appears as a litigant: Hughes Aircraft Systems International v AirServices Australia (1997)
- Requires the Crown to avoid a “purely technical point of pleading” and pursue fairness: Melbourne Steamship Co v Moorehead (1912)
- A model litigant is required to act with complete propriety, fairly and in accordance with professional standards
Civil Court Systems

State

Local Court

- Small Claims Division: claims up to the amount of $10,000
- General Division: claims between $10,000 and $100,000
- Jurisdictional limit of $60,000 for personal injury claims (section 29 Local Court Act 2007)
- Jurisdiction to hear criminal summary prosecutions, committal hearings, some family law matters, children’s criminal proceedings, juvenile prosecutions

District Court

- Civil jurisdictional limit of $750,000
- Unlimited jurisdiction in claims for damages for personal injuries arising out of a motor vehicle accident or a work injury

Supreme Court of NSW

- Highest State court in NSW
- Operates under the Supreme Court Act 1970 and the Civil Procedure Act 2005
- Unlimited civil jurisdiction
- It can hear all matters not within the exclusive jurisdiction of the Federal Court

Federal

Federal

- Regulated by the Federal Court of Australia Act 1976 (Cth)
- Jurisdiction conferred by various federal statutes
- Civil matters under federal law (including matters arising under the Constitution)
- Industrial disputes, corporations, trade practices, judicial review and federal tax matters
- Appellate jurisdiction to her appeals from decisions of single judges from various courts (Circuit, Supreme courts of States and Territories)

Federal Circuit Court

- Deals with a range of less complex federal disputes
- Jurisdiction includes family law and child support, admiralty, administrative law, bankruptcy, copyright, consumer protection law and trade practices, privacy, migration, unlawful discrimination
- Has a Fair Work Division

Family

- Jurisdiction under the Family Law Act 1975 (Cth)

High Court

- Created in 1901
- Commonwealth judicial power conferred on the High Court under s 71 of the Constitution
- Original jurisdiction pursuant to the Constitution (sections 75 and 76)
  - Matters arising under any treaty
  - Matters affecting consults or other representatives of other countries
  - Where the Commonwealth is a party
  - Between people in different states
  - Constitutional interpretation
- Has an appellate jurisdiction – can hear appeals from the High Court, federal courts, State Supreme Courts (High Court must give special leave to appeal)
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 hands of the parties without judicial supervision
- Prior to case management, delay had become a cultural norm
- Broad discretion given to the courts to make such orders for the conduct of any proceedings as appear convenient for the just, quick, and cheap disposal of the proceedings (rule 2.1)

Spigelman AC: “Case Management in NSW” – features of case management:

1) Court must monitor and manage its caseload and individual cases
2) Management cannot be successful without judicial leadership and commitment
3) Procedures must be clearly established in the legislation
4) Cases must be brought under court management soon after their commencement
5) Different kinds of cases require different kinds of management
6) The degree and intensity of management must be proportionate to what is in dispute and to the complexity of the matter
7) Number of court appearances must be minimised
8) Realistic but expeditious timetables must be set and adhered to
9) Identify the issues early in the proceedings
10) Trial dates established as soon as practicable
11) Alternative dispute resolution considered and sometimes mandated
12) Monitoring of the caseload must provide timely and comprehensive information to judges and court officers involved in management
13) Communication and consultation within the court and with others involved in the litigation process is an ongoing process

Civil Procedure Act 2005 (NSW) Sections 56 - 59

Key Issue in Civil Procedure

How to balance:

*Speedy disposition of cases v individual justice*

AON v ANU (2009)

- Facts: ANU commenced proceedings in the Supreme Court of the ACT against three insurers, claiming an indemnity for losses as a result of a fire – Aon was ANUs insurance broker – ANU sought an adjournment of the trial of its claim against Aon – foreshadowed an application for leave to amend that claim to add a new claim against Aon
- Purpose state in rule 21 (UCPR) reflects principles of case management: timely disposal of proceedings at an affordable cost
- Extent and effect of delay and costs are to be regarded as important considerations in the exercise of the court’s discretion as well as any prejudice which might reasonably be assumed to follow
- Much may depend on the point the litigation has reached relative to a trial when the application to amend is made
- Need to show application is brought in good faith and bring the circumstances giving rise to the amendment to the court’s attention
- In this case, the court demanded further explanation from ANU regarding the circumstances giving rise to the amended statement of claim

Qld v JL Holdings (1997)

- Facts: JL Holdings sued QLD for 60 million
- 6 months until 4-month trial would be listed, QLD sought leave to amend defence to add additional grounds
- A leave to amend pleadings can be granted at any stage of proceedings at discretion of trial judge
- Here judge refused on case management grounds - focused on the delay (1 year) caused by the amendment
- Queensland appealed to High Court
- Majority found that ‘case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, 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’
**Jackamara v Krakower**
- Delay will almost always impede the proper disposition of any case that does not come to trial promptly
- Impediments may be overcome but their presence is an added burden for both litigants
- Delay will almost always add to the costs
- Delay prolongs uncertainty

**ERA v Armstrong (2013)**
- Facts: inadvertent disclosure of documents by plaintiff to the defendant as part of discovery
- Considered the overriding purpose (section 56 CPA – just, quick and cheap resolution of the real issues in the dispute or proceedings)
- CPA imposes a positive duty upon a party and its legal representatives to facilitate the CPA’s purpose
- Requiring the court to rule upon waiver and the grant of an injunctive relief in the circumstances in the present case was inconsistent with this duty – should have returned privileged documents, privilege had not been waived

**Alternative Dispute Resolution**

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<th>Types of ADR</th>
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<tr>
<td>1. Facilitative – dispute resolution practitioner assists the parties e.g. mediation, facilitation and facilitated negotiation</td>
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<tr>
<td>2. Advisory – dispute resolution practitioner considers and appraises the dispute and provides advice e.g. expert appraisal, case appraisal, case presentation, mini-trial and early neutral evaluation</td>
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<tr>
<td>3. Determinative – process in which a dispute resolution practitioner evaluates the dispute and makes a determination e.g. arbitration, expert determination and private judging</td>
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<td>4. Hybrid – processes in which the practitioner plays multiple roles e.g. where the practitioner first mediates then arbitrates</td>
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**Arbitration vs. Mediation**

**Mediation**
- Most widely used form of ADR
- Involves a facilitated negotiation aimed and reaching an agreement
- A neutral 3rd party assists and facilitates an agreement between the parties and the parties don’t seek to convince the mediator but rather persuade the other party
- Mediator is chosen by parties unless mediation is connected to a court
- Compulsory mediation refers to mediation ordered by a court that has the power to refer a matter to mediation without the parties’ consent
- The development of compulsory mediation has seen an increase in its use but also given rise to questions about how successful a mediation will be if it is mandated and not what the parties want to do

**Process**
1. Mediators, parties and any lawyers introduce themselves and mediator explains the process and ground rules
2. Opening statements by each party in which they express their view of the dispute and the issues involved
3. Identification of issues and development of an agenda
4. Mediators support the exploration of issues
5. Confidential private sessions in which the mediator can test or develop options
6. Evaluation of options or offers
7. Parties negotiate an agreement or terminate the mediation
8. If participants agree on some or all of the issues an agreement is prepared and signed

**Arbitration**
- Quasi-judicial process where dispute is submitted to an arbitration who renders a binding determination
- Parties may agree to arbitration at the outset of dealings e.g. contract with an arbitration clause, or may be privately agreed to, or something mandated by law or court on the parties
- It is an adversarial process where arbitrator acts in a judicial manner – hears evidence and makes an award
- Court may order that proceedings before it be referred for determination by arbitration (s 38 CPA)
Advantages and Disadvantages of ADR

Advantages

- Saves time and money by allowing resolution in a shorter time frame when compared with court processes
- Greater flexibility in options for resolution and remedies (parties have more say)
- Preserve relationships
- Keep private disputes private
- Whatever is said by a litigant in an unsuccessful mediation cannot be used as evidence in any later proceedings – designed to facilitate the genuine negotiation of settlements: section 30 CPA
- Can permit more participation and encourage cooperation
- Settlement rates often very high (between 50 and 85%)

Disadvantages

- Compromise: in disputes of a serious nature, compromise may not be an option
- Settlements are not in the public record and therefore not exposed to public scrutiny
- Unsuccessful ADR results in litigation – inevitably adding on substantial costs to the entire process
- Lack of court protections and enforceability
- Delaying tactics
- Inequality in bargaining power more pronounced

Section 26 of the Civil Procedure Act 2005

(1) 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.

(2) The mediation is to be undertaken by a mediator agreed to by the parties or appointed by the court, who may (but need not be) a listed mediator.

(2A) Without limiting subsections (1) and (2), the court may refer proceedings or part of proceedings for mediation under the Community Justice Centres Act 1983.

(3) In this section, "listed mediator" means a mediator appointed in accordance with a practice note with respect to the nomination and appointment of persons to be mediators for the purposes of this Part.

Costs of Litigation

- Costs impact on access to justice – can place litigation beyond the reach of those who cannot afford, or cannot afford to risk, the cost implications of resolving disputes
- The imposition of costs during the course of an action is at the total discretion of the court
- Costs are not intended to punish but are intended to compensate the successful party for the solicitor’s professional costs and disbursements (not travel, lost time etc.)
- Costs can also be used as a mechanism to encourage settlement
- The court can take into account any failure of the parties’ duty to assist the just, quick and cheap resolution of the real issues [statutory duty – CPA s 56(3) and (4)]
- UCPR r 42.10 – the court has the power to order a party who fails to comply with the rules or any order of the court, to pay such of the other parties’ costs as are occasioned by the failure
- Ordinary Costs: costs that court usually orders one party to pay another party
- Indemnity Costs: all costs incurred

Priest v NSW [2007]

- Application concerning discoverability of documents
- Cost order against the government for not acting as a model litigant
- Governmental bodies, including the Commonwealth of Australia or State of New South Wales ought to be regarded as having model litigant obligations extending beyond those of the private litigant
- Defendant held to not have discharged its obligations under s 56 of the CPA or under its model litigant obligations
Proposals for Containing Costs

- Costs capping: maximum amount of costs parties can recover
- Stopwatch trials – has been trialled, there are limitations of this approach (time limits on each stage of the trial)
- Costs can be awarded against the legal practitioner
- A lawyer must reasonably believe based on the facts and the law that there are reasonable prospects of success
- Prevent lawyers from taking on hopeless cases

Lawyers Ethical Obligations to the Process

Civil Procedure Act Section 56

(1) The overriding purpose of this Act...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 interpreting any provision of statutory rules
(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose
(4) Solicitors, barristers and any person with a relevant interest in the proceedings must not, by their conduct, cause a party to proceedings to be put in breach of a duty
(5) The Court may take into account any failure...in exercising a discretion with respect to costs

Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015
- A lawyer’s paramount duty is to the court and the administration of justice and prevails to the extent of any inconsistency with any other duty: Rule 3.1
- Includes limiting hearings to the real issues in dispute and presenting the client’s case as quickly and simply consistent with its robust advancements
- A solicitor must act in the bests interests of a client, be honest in all dealings, deliver competent and prompt legal services and avoid any compromise to their integrity and professional independence: Rule 4

Legal Profession Uniform Law Application Act 2014 (NSW)
- Obligation on legal representatives
- Schedule 2.2(1) - A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner or associated responsible for the provision of services reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence has reasonable prospects of success
- May constitute professional misconduct – not a criminal offence
- Cost orders may be made against a law practice that acts without reasonable prospects of success and those costs are not recoverable from the client: Schedule 2.5
- A court may order costs against a legal practitioner: s 99 CPA
TOPIC THREE – Matters Preceding Litigation

1. When to commence – limitation periods
2. Where to commence – which court has jurisdiction
3. Who to commence against – preliminary discovery
4. What to commence with – originating process: statement of claim, summons, commercial list statement
5. How to serve originating process

Issues to Consider

- The cause of action and remedies
- Evidence required to prove the cause of action
- Disadvantages of litigation (uncertain, time consuming and costly)
- Whether the party has the funds to litigate the matter
- Whether the potential defendant has the assets to satisfy the judgment

Jurisdiction

- Prospective plaintiff will need to identify which court has jurisdiction to hear the matter
- All will depend on the subject matter and value of the claim
- If the plaintiff seeks equitable relief then it can only be granted by the Supreme court (District Court has some equitable jurisdiction)
- If a party seeks a legislative remedy, it must sue in the court or tribunal specified by the legislation
- Original jurisdiction of courts – identified in topic one (“civil court systems”)

Cross-Vesting

- Legislation introduced to account for circumstances where multiple matters in a dispute meant plaintiff’s had to plead separate cases in separate courts
- States cannot confer jurisdiction in State matters on the Federal and Family Court (Re Wakim)
- Conferral of Federal jurisdiction on State courts
- Cross-vesting of State jurisdiction among State courts
- Transfer of proceedings between courts participating in the scheme (transfer to the most appropriate court)

BHP Billiton v Shultz

- Facts: Schultz suffered from asbestosis and asbestos-related pleural disease and sued BHP for negligence, breach of contract and breach of statutory duty in the Dust Diseases Tribunal of New South Wales
- Pursuant to section 5 Jurisdiction of the Courts (Cross-Vesting) Act applied to remove proceedings from the Tribunal to the Supreme court of NSW and then transfer them to the Supreme Court of SA
- Application was refused – went on appeal to the High Court
- Plaintiff’s choice of Tribunal and the reasons for it are not to be taken into account in determining whether proceedings should be transferred to another court
- Factors relevant to the choice of forum:
  - Place where the parties reside or carry on business
  - Location of subject matter of the disputes
  - Importance of local knowledge to the resolution of the issues
  - Law governing the relevant transaction
  - Procedures available in different courts
  - Likely hearing dates in the different courts
  - Whether it is sought to transfer the proceedings to a specialized court

Preliminary Discovery

- Order for preliminary discovery is made before the commencement of proceedings
- Part 5 of the UCPR has expanded the ambit of preliminary discovery orders to include any information that could assist a party to determine whether they should commence an action
- An order for preliminary discovery can require documents to be produced and/or a person to be orally examined in court
- The judge has discretion to make an order under party 5 of the UCPR
- If the substantive proceedings have not yet commenced, the order would be sought by filing a summons
- Preliminary discovery for identity or whereabouts: UCPR rule 5.2
- Preliminary discovery for deciding whether or not to commence proceedings: UCPR rule 5.3
**RTA v Australian National Car Parks**
- Facts: ANCP operated car parks and required entrants to obtain and display a ticket or pass – some entrants parked without doing so – defendant wished to sue them in contracts— any claim brought against the driver of the car would involve less than $100
- Respondent sought preliminary discovery from the RTA for the names/addresses of all vehicles – UCPR rule 5.2
- Applicant must be unable to sufficiently ascertain the identity or whereabouts of the intended defendant despite having made reasonably inquiries
  - Having other means of ascertainment does not make it unreasonable to make a claim under UCPR
  - Cost, delay and uncertainty is relevant to the rule’s “reasonable inquiries”
- Applicant must show the respondent may have or have had information in their possession
- Held: RTA ordered to provide preliminary discovery
  - Information would assist the respondent in its task of establishing the driver on the day
  - Further inquiries may be necessary
  - Does not mean the information lacks forensic worth

**Hatfield v TCN Channel Nine**
- Facts: applicant sought orders that the respondents give preliminary discovery of an episode of **underbelly** to determine whether she had a claim in defamation and whether she might be entitled to an urgent injunction – UCPR rule 5.3
- Trial judge rejected the claim
- On appeal, the evidence satisfied all requirements of the UCPR – matter of judicial discretion
- The TV show represents “faction” (fact/fiction, factual events with a bit of embellishment or interpretation), and is based on events which were already made well known (and public domain) in a Royal Commission some 15 years before
- The Defamation Act does not seek to place unreasonable limits on free speech or freedom of expression
- Appeal was dismissed

**Rinehart v Nine Entertainment Co Holdings Ltd**
- Facts: Gina Rinehart sought preliminary discovery of an episode of the defendant’s mini series which portrayed incidents of the life of Rinehart
- Application was granted given the possibility of serious defamation

**Limitation Periods**
- Limitation period: the time period within which to bring a claim
- Dictated by various statutes
- Rationale for imposing limitation periods – McHugh J in Brisbane South Regional Health Authority v Taylor
  - Where there is delay, the quality of justice deteriorates
  - Important, decisive evidence may disappear without people knowing it ever existed
  - Oppressive to a defendant to allow an action to be brought long after the circumstances which gave rise to it
  - Businesses have an interest in knowing they have no liabilities beyond a definite period
  - Public interest requires disputes be settled as quickly as possible
- Limitation periods are a matter of substantive, not procedural, law
- The cause of action will be unenforceable if brought outside the limitation period
- A plaintiff may be able to apply for an extension of time within which to bring their claim

**Specific Limitation Periods**

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<tr>
<th>Cause of Action</th>
<th>Period (Limitation Act 1969 (NSW))</th>
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<tbody>
<tr>
<td>Contract</td>
<td>6 years from the date on which the cause of action accrues to the plaintiff – s 14(1)(a) → E.g. from date of breach</td>
</tr>
<tr>
<td>Tort General</td>
<td>6 years from the date on which the cause of action accrues to the plaintiff – s 14(1)(b)</td>
</tr>
<tr>
<td>Breach of trust or recovery of trust properties</td>
<td>6 years from the date on which the cause of action accrues to the plaintiff – s 48</td>
</tr>
<tr>
<td>Cause of action founded on a deed</td>
<td>12 years from the date on which the cause of action accrues to the plaintiff – s 16</td>
</tr>
<tr>
<td>Recovery of land</td>
<td>12 years from the date on which the cause of action accrues to the plaintiff – s 27(2)</td>
</tr>
<tr>
<td>Defamation</td>
<td>1 year from the date on which the cause of action accrues to the plaintiff – s 14B</td>
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</tbody>
</table>
Personal injury (after 5 December 2002) 3 years from the date on which the cause of action is discoverable by the plaintiff or 12 years running from the time of the act or omission alleged to have resulted in the injury or death, whichever period is the first to expire – s 50C(1)(a) or 50C(1)(b)

Work injury 3 years after the date on which the injury was received – s 151D

Motor accident 3 years after the date of the motor accident – s 109 Motor Accidents Compensation Act 1999 (NSW)


- Facts: May 26 2004 plaintiff (2) was injured at Gosford police station – taken to hospital and required an amputation of part of her right ring and little fingers and some reconstruction of tendons – mother consulted a solicitor, who wrote to the police station concerning a claim for damages – solicitor inspected and photographed the offending door June 4 2004
- 21 June 2007 (3 years and 26 days after the incident) a statement of claim was sealed and issued, it was served on 29 June 2007
- The State sought to have the claim struck out pursuant to s 50C – statute barred
- Issue for determination on appeal:
  - Whether the cause of action was “discoverable” by the plaintiff’s mother within the 26-day period after the accident
  - Whether the plaintiff’s mother was aware that the injury to her daughter was caused by the fault of the defendant and that the injury was sufficiently serious to justify the bringing of an action
- Plaintiff succeeded

Preservation Orders

- Prospective party may obtain court orders (an “interim injunction”) to search for and preserve evidence
- Can be obtained on an ex parte basis (in the absence of the other party)
  - If you’re trying to prevent the destroying of evidence, for example, they may destroy it upon receiving notice of the order

1. Anton Piller Orders (Search Orders)

- Named after Anton Piller KG v Manufacturing Processes Ltd [1976]
- Authorise the seizure of documents and other evidence
- Court must appoint independent solicitors to supervise search orders: Rule 25.23
- Usual undertaking as to damages: Rule 25.8

Purpose: to permit persons to enter premises and search for, inspect, copy and remove things described in the search order. It is designed to preserve important evidence pending the hearing of the claim

Requirements: UCPR 25.20

(a) Applicant has a strong prima facie case
(b) Potential for loss/damage to applicant serious if order not made
(c) Important evidence and real possibility of destruction

Austress Freyssinet Pty Ltd v Joseph [2006]

- Plaintiff alleged defendant used confidential material to steal custom for his own new business
- Gained search order ex parte but defendant applied to have it set aside
- Very strong prima facie case, evidence that defendant had emailed documents to his home computer and deleted them when confronted
- Order modified so that only the plaintiff’s solicitors could carry out the search
2. Mareva Injunction (Freezing Orders)

- Named after *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975]
- Prevents a party from disposing of assets to frustrate the enforcement of a judgment
- Derives from the court’s inherent equitable jurisdiction
- Must be a real risk that any judgment in the proceedings may not be satisfied

**Purpose:** to prevent frustration or abuse of the process of the court

- Extraordinary interim remedy because it restricts the right to deal with assets
- Can be made against 3rd parties: *Cardile v LED Builders Pty Ltd* (1999)

**Requirements**

- Plaintiff must provide
- - Details of the judgment or the un-litigated cause of action on which the application is based
- - Details of the nature and the value of assets to be the subject of the order
- - UCPR 25.11
  - Plaintiff must show the order is necessary to prevent the frustration or inhibition of the court’s processes
  - This can be done by demonstrating that there is a danger that judgment may not be satisfied
- - Plaintiff must show they have a good, arguable case: Rule 24.14(1)(b)
- - An applicant for an ex parte freezing order is under a duty to disclose all material facts to the court
- - Usual undertaking as to damages: Rule 25.8

*Jackson v Sterling Industries Ltd* (1987)

- Appellant ordered by Federal Court to provide security of $3m to Federal Court
- Went beyond what was permissible
- Normally party must first obtain judgment and then enforce it
- Order should not have been made as providing security into court

**Originating Process – Summons or Statement of Claim**

- Originating process means the process by which proceedings are commenced, and includes the process by which a cross-claim is made
- In NSW proceedings are commenced by either a summons or a statement of claim
- The date of filing the originating process is conclusive for the purposes of any limitation period
- If the plaintiff uses the wrong originating process, there are rules that take the proceedings to have been duly commenced and provide the court with the power to make appropriate orders: Rule 6.5, 6.6
- After the originating process has been served, the defendant has the opportunity to respond with an appearance or defence by using the prescribed form
- A failure to serve the originating process within the prescribed time does not prevent the plaintiff from commencing fresh proceedings via a new originating process: Rule 6.2(5)
- Statement of claim is usually required when the action involves disputed contentions of fact
- Summons is usually required where there is a question of law at issue (initiates a summary procedure)
- Summons and statement of claim must be personally served on the defendant
- Valid for service for 6 months after the date on which it was filed in the Supreme Court or Local Court (1 month in District Court) – can be extended by order of court

**Statement of Claim**

Must include:

- Court, parties (name, addresses, contact details), type of claim, relief claimed (damages, interest, costs), pleadings and particulars, plaintiff’s legal representative and their contact details
- Notice to defendant telling them if they do not file a defence within 28 days of being served then they will be found in default in the proceedings and judge may enter judgment against them without any further notice to them

Can Respond by:

- Filing a defence or cross-claim if they intend to dispute the claim
- Where money is owed, defendant may choose to pay all or part of the money claimed}
Service

- Service is the term used for methods of alerting people that there are proceedings against them
- Service is the foundation of jurisdiction
- It is an essential requirement of natural justice — other side must be aware of the proceedings to exercise entitlement to be heard
- Purpose of service is to bring proceedings to the attention of the defendant: United Group Resources Pty Ltd ABN 17 114 888 201 v Calabro (No 4) [2010]
- A party who files a document must as soon as practicable serve copies on each other active party: Rule 10.1
- A document is filed when it is lodged at the court registry — stamped with the court seal and then served on the defendant
- A document can also be filed during court proceedings
- Service can be proved by filing an affidavit of service in accordance with Rule 35.8
  - A statement as to when, where, how and by whom service was effected
  - A statement as near as practicable to the actual words used by the person to whom the process was delivered
  - A statement that the person making the affidavit is over the age of 16 years

Various Methods of Service — UCPR 10.5(1)

Personal Service

- Where personal service is required: Rule 10.20
- How personal service is effected: Rule 10.21
- Personal service requirements may be dispensed of if a party’s solicitor accepts service — must make a notation on the document that he or she has accepted service on behalf of the person being served: Rule 10.13
- If, by violence or threat of violence, a person attempting service is prevented from approaching another person for the purpose of delivering a document to the other person, the person attempting service may deliver the document to the other person by leaving it as near as practicable to that other person: Graczyk v Graczyk
- Corporations can be served personally by postage to a registered office: s 109X(1)(a) of the Corporations Act 2001

Service by Agreement, Acknowledgment or Undertaking — UCPR 10.6

- A contract can stipulate an agreement that service in regard to judicial proceedings will be effected in accordance with the contract rather than the rules of the court
- Such an agreement must specifically pertain to the mode of service

Substituted and Informal Service — UCPR 10.14

- The court’s power to make an order for substituted service depends on the applicant establishing the impracticability of service in accordance with the rules
- Court must also be satisfied that the method of substituted service sought is in all reasonable probability is likely to bring the proceedings to the knowledge of the defendant
- Orders are typically made where the defendant has been evading service

Threshold Requirements

- Evidence should be put forward that prior attempts to serve in accordance with the rules failed or that such service would be futile
  - Mere cost or inconvenience will not be persuasive
  - Affidavit evidence will need to explain by service is not practicable or why previous attempts failed
- Evidence showing that the substituted service is reasonably likely to bring the proceedings to the defendant’s attention
Flo Rida v Mothership Music Pty Ltd [2013]
- Court held that there was insufficient evidence to establish the impracticability of service
- An order for substituted service was made in the District Court – Flo Rida's appeal was upheld in the New South Wales Court of Appeal – order for substituted service should not have been made
- Issue in question: whether UCPR r 10.14 permitted the making of an order for substituted service
- Evidence suggests Flo Rida was in Australia when the order for substituted service was made
- Order ought not to have been made in the absence of evidence that the means of substituted service sanctioned by the order were likely to bring service of the statement of claim to Flo Rida's attention whilst he was in Australia
- Had the effect of ordering substituted service on a defendant who was overseas and not lawfully able to be personally served overseas
- The evidence did not establish, other than by mere assertion, that the Facebook page was in fact that of Flo Ride and did not prove that posting on it was likely to come to his attention in a timely fashion
- Substituted service by email – intended recipients of the emails were not identified in the order

Bulldogs Rugby League Club v Williams [2008]
- Facts: Sonny Bill Williams was alleged to have breached his contract to play Rugby League for the Bulldogs – left Australia to play in France – commenced proceedings by way of summons against Williams in the Supreme Court of NSW – summons proved difficult to serve personally
- Court was informed, in detail, of the failed attempts to effect personal service
- Substituted service ordered (Sydney address, France address, text messages)
- Substantial compliance with these orders
- Personal service was ultimately achieved

Appearance

Appearance

- A party may not take any step in the proceeding without entering an appearance
- Having received the statement of claim, the defendant must file a notice of appearance within 28 days: Rule 6.10
- Having received a summons, the defendant must file a notice of appearance before the return date stated on the summons
- Defendant must serve their appearance on the plaintiff
  - This waived objection to any failures with service of originating process and indicated submission to jurisdiction
  - Serve on the plaintiff's address for service as indicated on the originating process
- If defendant wishes to object, should use notice of motion without entering an appearance: Rule 12.11
- A defendant who files a defence is taken to have entered an appearance in the proceedings: Rule 6.9(2)
- Where a defendant files an appearance:
  - Statement of claim: prevents the plaintiff from entering a default judgment
  - Summons: prevents the plaintiff from seeking judgment for the relief claimed
- If the defendant wishes to object to the jurisdiction or originating process, a notice of motion should be filed: Rule 12.11

Ghosh v Ninemsn Pty Ltd [2014]
- Respondent had not filed a notice of appearance as they disputed proper service
- Court found they had appeared and even obtained a favourable costs order and were required to file notice of appearance pursuant to UCPR 6.1
- Court doesn’t have much sympathy with service arguments when you know about proceedings: consider overall purpose of service is to bring proceedings to the attention of the defendant

3 Types of Appearances

1. Conditional appearance – defendant only appear to contest right of court or party
2. Unconditional appearance – defendant accepts court’s jurisdiction but contests the plaintiff’s claim
3. Submitting appearance – defendant submits to court’s decision. No active role in litigation (uncommon)
TOPIC FOUR – Pleadings and Particulars

Pleadings

- Pleadings are formal documents exchanged indicating the claims and defences, filed in the registry of the court or in court
- UCPR dictionary indicates that ‘pleading’ includes a statement of claim, a cross-claim, a defence, a defence to cross-claims, a reply and any subsequent pleading for which leave is granted under part 14 – does not include a summons or notice of motion
- Applicable to matters being dealt with at trial (as opposed to matters being dealt with by summary determination)
- Pleadings are binding on the parties
- Once the statement of claim has been filed and served on the defendant, if the defendant does not ‘traverse’ by denying or by making a statement of non-admission in regard to each of the factual allegations in the statement of claim, those facts are deemed to be admitted
- After the defence has been delivered the last unanswered pleading is deemed to be denied unless further pleadings are served
- Pleadings may be amended during trial
- A court may decide based on the evidence that the cause of action has been pleaded defectively

Objective of Pleadings

- Provide a permanent record of the boundaries of the case and allow the court to know the issues in the proceedings
- Can prevent litigation at a later date on the same issues
- Provide sufficient information to the parties to allow each of them a fair opportunity to meet the issues in proceedings
- Expression of the adversarial system – parties define the dispute
- Admissions to pleadings can be important to saving time and money
- Limit the extent of discovery and interrogatories and govern the extent of the relevant evidence
- A party can only present a case to a court on the basis of their pleadings
- If evidence arises beyond the scope of the pleadings in the trial doesn’t mean the case can’t be decided on that basis – the other side has to be given a fair opportunity to respond to that evidence

Matters to be Pledged

Plaintiff
- The parties
- The material facts, substantiating each element of each cause of action
- Material facts: critical facts to supporting each of the element of each cause of action
- Should not contain mere allegations or conclusions of law
- Evidence is the means by which material facts are proved and should not be pleaded
- Particulars
- If certain material facts aren’t pleaded, the result is ‘surprise’, dealt with under UCPR r14.14
- Remedies (relief)

Defendant
- What the defendant admits, does not admit or denies (does not admit: not within their knowledge)
- Material facts substantiating each element of each cause of action
- Particulars
- Defences requiring a positive pleading

Drafting Pleadings

- Form – numbered paragraphs (14.6)
- As brief as possible (14.8)
- Material facts not evidence (14.7)
- References in pleadings to documents and spoken works (14.9)
- Pleadings to be consistent as to allegations of fact (14.18)
- Pleadings may raise a point of law (14.19)
- Must plead specifically (14.14)
No Surprises

Glover v Australian Ultra Concrete Floors Pty Ltd [2003] NSWCA 80
- Plaintiff claimed damages for work injury, lost at trial – appealed
- Defendant’s pleadings implied acceptance of plaintiff’s version of the accident, did not admit negligence
- Given the impression he would be challenging whether plaintiff’s version of events constituted negligence
- Case at trial – defendant alleging the plaintiff’s claim is fraudulent but had not put this in their pleadings
- Plaintiff taken by surprise at trial, contrary to the surprise rule
- “Cards on the table” approach

Joinder of Issue
- Joint means take issue/dispute a matter
- An express joinder of issue (for example, “The plaintiff joins issue on the defendant’s defence” or “The plaintiff joins issue on the defendant’s defence except for paras 1 to 5 inclusive which are admitted”) operates as a denial as to every allegation of fact in the previous pleading other than those expressly admitted: r 14.27(1) and (6)
- There is an implied joinder of issue if there is no reply to a defence or no answer to a subsequent pleading: r 14.27(2) and (3). An implied joinder of issue operates as a denial of every allegation of fact made in the pleading to which it relates: r 14.27(5).

Particulars
- Whereas pleadings cover material facts, particulars are details of those facts
- They are provided either in the statement of claim or defence, or provided separately
- Particulars limit the generality of pleadings so as to more sharply define the issues but do not modify the cause of action
- Submission must provide all particulars ‘as are necessary to enable the opposite party to identify the case that the pleading requires him or her to meet’ (UCPR 15.1)
- So basically pleadings = material facts, particulars = details of those facts
- E.g. Pleading: ‘I tripped and fell.’ Particulars: ‘This occurred at Woolworths on December 20th 1993 in the presence of 50 other customers.’ Etc.
- E.g. Pleading: ‘Statement was made confirming the car was safe.’ Particulars: ‘This was said by the manager of the company on 20th of December to me and my husband.’

Defective Pleadings
Pleadings are defective if they do not comply with the UCPR

a) Not in correct form (14.5)
b) Plead evidence (14.7)
c) Not specific or brief (14.14/14.8)
d) Inconsistent allegations of fact (14.18)
e) No reasonable cause of action (14.28)
f) Prejudice, embarrassment or delay (14.28)
g) Abuse of process (14.28)
h) Frivolous, vexatious, abuse of process, no reasonable cause of action (13.4)

Consequences of defective pleadings
1. Striking out pleadings → pleadings can be struck out if do not disclose a reasonable cause of action or a defence, if it has tendency to cause prejudice, embarrassment or delay in the proceedings or is otherwise an abuse of the court’s process (Rule 14.28)
2. Dismissal can be ordered (UCPR 13.4) if proceedings are frivolous or vexatious or no reasonable cause of action is disclosed, or the proceedings are an abuse of the process of the court

Priest v NSW
- Pleadings considered embarrassing because it was ambiguous, unintelligible or too vague or general
- Embarrassment: pleading susceptible to various meanings
Ashby v Slipper
- Slipper’s alleged misconduct – government expense account fraud and sexual harassment
- Counsel argued proceedings were an abuse of process (brought for the purpose of a political attack)
- Irrelevant, scandalous allegations calculated to injure Slipper
- First instance: abuse of process
- Decision was appealed
- Ashby eventually discontinued proceedings

Amendment of Pleadings
- May be necessary if a party makes a mistake, want to add a party or cause of action or fact or defence, fix error/mistake
- A plaintiff may, without leave, amend a statement of claim once within 28 days of filing however if a date has been fixed for trial within that time an order from the court is required to amend the statement of claim
- If the statement of claim is amended after the defendant has already filed a defence, the defendant may amend the defence within 14 days after a service of the amended statement of claim (Rule 19.2)
- Amending a statement of claim is dealt with in the UCPR
- The main power available to amend documents is sections 64 and 65 of the CPA
- Court has broad discretion allow amendments as justice requires, subject to their ‘overriding purpose of efficiency’ (section 56 of CPA), prejudice, costs and effect on public resources
- The overriding purpose of efficiency and stuff (as dealt with in Aon v ANU) has to be balanced with purpose of justice in order to determine whether they allow for amendment of pleadings
- Mode of amendment: Under Rules 19.5 and 19.6, mode of amendment requires the filing of a fresh document that indicates amendments via underline or something

Aon v ANU (2009)
- Third day of 4-week trial and plaintiff applies for adjournment and leave to amend its statement of claim to add a substantial new claim against D
- HCA said they weren’t allowed because it would be contrary to the overriding purpose of efficiency
- Shows how the ‘overriding purpose rule’ works

Reasonable Prospects of Success
- Section 347 of Legal Professions Act 2004 places restrictions on commencing proceedings without reasonable prospects of success (see legislation section)
- Section 348 provides that cost order can be made against law practice acting without reasonable prospects of success
- However, costs are only intended to compensate the party for the solicitor’s professional costs and disbursements such as barristers’ fees in conducting the case. They are not intended as a dividend or as a punishment.
- However, in Lemoto [2005] NSWCA 153, McColl JA found that ‘reasonable minds may differ’
- Section 99 CPA goes into liability of legal practitioner for unnecessary costs

Treadwell v Hickey [2010]
- Without reasonable prospects of success means ‘so lacking in merit or substance as to be not fairly arguable’
- ‘Reasonable belief’ as to the prospects of success must have its objective foundation in material available to the practitioner at the relevant time
- Authorities show that a cost order under section 348 of the Legal Profession Act is not to be lightly imposed upon a practitioner who has represented an unsuccessful party to a proceeding
- There is a high threshold, which must be satisfied before the court will consider exercising its discretion to make such an order

Gathering Evidence
Discovery
- Enables the parties to obtain documents from each other
- Process is where one party seeks documents within a class or classes of documents or samples of documents within a class from the other party
- Classes of documents are specified by relevance to one or more facts in issue or by description of their nature and time period
- Can be agreed to informally between the parties or it can be subject of a court order
- Party providing discovery creates a list of the relevant documents and then makes the documents available to be inspected by the party that seeks discovery – disclosure and inspection of the documents in the discovery process is subject to privilege (see section on privilege)
- Excluded documents do not need to be included in the list of documents
- There is also a continuing obligation to give discovery (Rule 21.6)
- No order for discovery in personal injury cases (Rule 21.8)
- Intended to promote a fair trial and reduce surprise in litigation – parties are aware of the case to bet met at trial (Percy v General Motors Holden Pty Ltd [1975])
- Cannot destroy documents in anticipation of litigation
- Discovery takes place after pleadings have closed
- Supreme Court Practice Note 127 encourages the use of technology for the purposes of information exchange

**ERA v Armstrong**
- Solicitors for party giving discovery sent a disk will all discovered documents – solicitor discovered documents they thought should have been the subject of a privilege claim
- Inadvertent disclosure
- Went to the High Court on whether privilege had been waived
- Although discovery is an inherently intrusive process, it is not intended that it be allowed to affect a person’s entitlement to maintain the confidentiality of documents where the law allows
- Court highly critical of the party who was refusing to return the privileged documents
- Ethical reasons - should have returned documents
- Court at first instance could have used its broad discretion to order the other party to return the documents

**Problems with Discovery**

3 categories of discovery abuse
- Making unnecessarily broad discovery requests
- Withholding information to which the requesting party is entitled
- Trolley load litigation or trial by avalanche: providing many irrelevant documents to overwhelm the other side, or to improperly conceal documents

Excessive and wasteful discovery may conflict with a number of professional and ethical duties
- Acting with competence, honesty and candour
- Facilitating the quick, just and cheap resolution of disputes
- Act with fairness
- Narrow the issues in dispute and identify relevant material

**Process of Discovery**

1. Party A files and serves a notice of motion seeking discovery from Party B (UCPR r 21.2)
2. Interlocutory hearing (notice of motion is heard) – the court does not order general discovery
3. Within 28 days of the order Party B prepares a list of documents that describes the documents, states whether privilege is claimed (and circumstances giving rise to privilege)
4. The list must be accompanied by a supporting affidavit by Party B (UCPR r 21.4(2)) and a solicitor’s certificate of advice (UCPR r 21.4(3))
   a. Verifies the list
   b. Solicitor’s certificate of advice to confirm the solicitor has advised Party B as to their obligations arising under discovery and the solicitor is not aware of documents not on the list
5. Party B makes the documents readily available and capable of convenient inspection (UCPR r 21.5)
6. Continuing obligation on Party B to make available subsequently discovered documents (UCPR r 21.6)
   a. Privileged documents that cease to be privileged also need to be made available
7. No information from a document obtained in discovery is to be disclosed or used in legal proceedings, unless
   a. With the court’s leave or where these documents have been admitted into evidence
8. The court will not order discovery in personal injury cases, unless “for special reasons” (UCPR r 21.8)
Disclosure in the Equity Division – Supreme Court Practice Note SC Equity 11

- Measure taken to control discovery abuse – reduce the cost of discovery
- Applies to all new and existing proceedings in the Equity Division
- Requires that:
  1. The court will not order disclosure until the parties have served their evidence, unless “exceptional circumstances” necessitate disclosure
  2. There will be no order for discovery unless it is necessary for the resolution of the real issues in dispute in the proceedings (not essential, but reasonably required for the fair disposition of the matter)
  3. Any application for disclosure must be supported by an affidavit, outlining:

  i. Why disclosure is necessary
  ii. The classes of documents sought
  iii. The likely cost of disclosure

In the Matter of Mempoll Pty Ltd, Anakin Pty Ltd and Hold Kings Pty Ltd
- Question: what constitutes exceptional circumstance
- No all-encompassing definition of what is an exceptional circumstance
- Must be something out of the ordinary
- Must be something that necessitates disclosure – party’s case cannot be put without the disclosure
- Court of the view that those circumstances existed in this situation

Graphite Energy Pty Ltd v Lloyd Energy Systems Pty Ltd [2014]
- Considered the meaning of the phrase: until the parties to the proceedings have served their evidence
- Does not mean they have to have served all of their evidence
- Intent of the practice note – formal discovery should be deferred until parties have served their affidavits of evidence
- Intention: reduce the burden of discovery – issues have been defined by the pleadings, and refined by affidavit evidence (limits its scope)
- Avoids the mischief of parties constructing their evidence around discovered documents

Subpoena
- A subpoena a process compelling a person to give or produce something
- Can either be a subpoena to give evidence (attend a trial as a witness) or to produce documents
- Once a subpoena is filed in court and served it becomes an order of the court
- Person or entity served with the subpoena to produce must gather the documents sought and produce them to the court by the return date stated on the subpoena
- Failure to comply with a subpoena is a contempt of court
- Party required to produce may seek to have a subpoena set aside on grounds that it lacks a legitimate forensic purpose or is oppressive or has an improper purpose
- A person or entity can claim privilege over subpoenaed documents in order to resist access being granted to the party issuing the subpoena
- Any party to trial proceedings may seek an order from the court to issue a subpoena
- Issued through the court registry
- Subpoena must be personally served on the addressee and then on each other party

Setting Aside a Subpoena
- A party or a person with a sufficient interest can seek an order setting aside the subpoena
- Subpoenas are not a substitute for discovery – can’t be oppressive or have an improper purpose
- Must have a legitimate forensic purpose

AG v Chidgley
- A subpoena without a legitimate forensic purpose is an abuse of process and its recipient can apply to the court to have it set aside
- Test for determining ‘legitimate forensic purpose’ is in this case
- Before subpoena is granted, party must:
  a. Identify a legitimate forensic purpose for which access is sought; and
  b. Establish that it is ‘on the cards’ that the documents will materially assist his or her case.
Notice to Produce
- UCPR allows parties to serve notices to produce any specified document or thing on another party
- Act in a similar way to subpoenas but do not need to be filed with the court
- After party is served with notice to produce, must provide inspection of the document or thing within a reasonable time (taken to be 14 days after service of notice)
- A notice to produce can only be served on a party to the proceedings
- Unless the court orders otherwise the party served must comply with a notice to produce (UCPR 21.11 and 34.2)
- Can’t be served on third parties
- Unless the court orders otherwise, party must comply with the notice to produce

Notice to Admit
- A notice served by one party to the proceedings on another, requiring the party to admit specified facts for the purposes of the proceedings only (UCPR 17.3) or to admit the authenticity of specified documents (UCPR 17.4)
- Used to narrow the issues in dispute in a proceeding to save time and cost
- A party may withdraw an admission only with leave of the court
- If the admitting party does not serve a notice disputing the facts or the authenticity of the document within 14 days of service, that fact is, for the purposes of the proceedings, taken to have been admitted by the admitting party in favour of the requesting party only (UCPR r17.3)

Interrogatories
- Discovery by interrogatories is a procedure where a party may be ordered to answer specified questions
- Questions are usually answered on oath and can be tendered as evidence in the trial
- Can be ordered at any stage of proceedings
- Must relate to the issues in the pleadings
- For personal injury matters the court must be satisfied that special reasons exist

Summary of what UCPR provides:
1. Party can seek order from court to administer interrogatories at any stage of proceedings
2. Order will only be made if ‘necessary’
3. Answering party may be ordered to answer specified questions
4. Answers are usually required to be verified by affidavit
5. Party may object to answering on basis it does not relate to any matter in issue between parties, question is vexatious or oppression and/or answer would disclose privileged information
6. Insufficient answers – court may order for further answer
7. Answers can be tendered as evidenced in the trial
8. No order will be granted in personal injury actions unless court is satisfied that special reasons exist
9. Party can object to answering interrogatories

Vanacom Pty Ltd v Morgan Brooks Pty Ltd [2006]
- Campbell J observed that under UCPR 211.1(4) the court was not to make an order for interrogatories unless it was satisfied the order was necessary at the time it was made
- The court did not make an order in this case as the plaintiff’s evidence in chief had not been filed and it was premature for any interrogatories at all to be delivered at the time in question
TOPIC FIVE – Opposing Disclosure: Privilege

Introduction to Privileges

With respect to discovery of documents, first ask:

- Is this a fishing expedition?
- Does it serve a legitimate forensic purpose?
- Is the information relevant to the other sides case?
- Is it oppressive, then?
- Consider privilege

Privilege

- Privilege: a means of resisting disclosure, exists to protect different interests and/or relationships
- Can be raised at the trial to object to the admissibility of evidence at the stage when evidence is being adduced
- Attaches to the information, rather than the document itself
- Information subject of the privilege may be in oral form or in writing
- The test of whether privilege or immunity attaches is different in each privilege
- The right to claim privilege and prevent access to information belongs to the person vested with the interest or relationship protected by the privilege (the privilege holder)
- The privilege holder may or may not be a party to the case: New South Wales v Public Transport Ticketing Corporation [2011]
- A privilege claim is usually supported by affidavit evidence that proves the necessary facts for a privilege claim

Context for Privilege Claim

A claim for privilege can be asserted in the following situations:

a) In response to a subpoena seeking production of documents (object to production or inspection)
b) In response to an order for discovery
   a. Regulated by UCPR Part 21
   b. If the party seeking discovery wishes to challenge a claim for privilege, they must file and serve a notice of motion seeking an order that the relevant document be produced for inspection
c) To object to answering an interrogatory - UCPR r 22.2(c)
d) In response to a notice to produce
e) To object to an order to produce or inspect documents made by the court pursuant to section 68 of the Civil Procedure Act 2005 (NSW)
f) To resist other forms of compulsory acquisition of documents (e.g. search warrants/orders)
g) To object to the tender of a document during a hearing (at a time when evidence is adduced)
h) To object to the oral examination of a witness during a hearing

Applicable Law and Procedure for a Privilege Claim

- The privileges in the Evidence Act 1995 (NSW) apply when evidence is being adduced
- The effect of section 131A(1) is that the Evidence Act applies to pre-trial proceedings
  - Court must apply the rules set out in the act for determining the disclosure requirement for documents in all preliminary proceedings
- 3 points regarding the limitations of s 131A of the Act
  1. Does not appear to apply to investigatory or non-curial processes
  2. Applies when the person required by a disclosure requirement to give information or to produce a document, is the person who also objects to giving that information
  3. Has been held to apply only at the stage of objection to production

New South Wales v Public Transport Ticketing Corporation [2011]

- Issue: whether the State can be a person within the definitions of the Act
- Held: yes – but the person objecting has to be the same person who is subject to the disclosure requirement
- Here the State was a third party to proceedings (PTTC had been ordered to provide discovery)
- Section 131A did not apply to these proceedings: State couldn’t claim PII
- Principle: only the person subject to the disclosure requirement can claim privilege under s 131A
- Third parties can intervene and claim privilege in a case where they are not a party – common law applies
Client Legal Privilege

- Client legal privilege protects confidential communications made, and confidential documents prepared, for the dominant purpose of a lawyer providing legal advice or a lawyer providing legal services relating to litigation
- Client’s privilege, not the lawyers – client is the only person who can waive it
- Legal practitioner as ostensible authority to waive privilege on behalf of their client
- Exists to ensure proper legal advice – clients are frank and open, allowing lawyers to provide fully informed legal advice: *Osland v Secretary to the Department of Justice* [2008], *Esso v FCT*
- A rule of substantive law and an important common law immunity
- The legal practitioner has a duty of protecting and upholding the privilege
- Can be abrogated by statute – e.g. for obtaining documents in relation serious terrorism offences
- *AFP Commissioner v Propend* – seen as more than a mere rule of evidence, it is a substantive general principle which plays an important role in the effective and efficient administration of justice by the courts
- A copy of an unprivileged document can be considered privileged (test is anchored to the purpose for which the document was brought into existence): *Commissioner AFP v Propend Finance*

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd [2013] HCA 46

- Facts: Expense Reduction (represented by Norton Rose) was ordered to provide discovery of 60,000 documents to Armstrong – documents were provided on disks – During the discovery process Norton Rose inadvertently disclosed 13 documents claimed to be privileged
- Appeal to the High Court concerned this inadvertent disclosure of documents subject to client legal privilege
- High Court held this was a mistake that was necessary to be corrected
- There was no delay in the mistake being notified or confirmed
- Armstrong would not be prejudiced by requiring the disks to be returned

Elements of Client Legal Privilege

1. Confidential communication or document
2. Lawyer and client relationship (corporate clients and in-house lawyers can claim it)
3. Dominant purpose of the communication is for existing or anticipated litigation, or for legal advice

Dominant Purpose Test

- Dominant purpose test overruled the previous common law test – the sole purpose test
- The purpose in existence at the time of the making of the confidential communication or preparation of the confidential document is determinative
- Proof of a dominant purpose will not be satisfied by a person stating they prepared the document for the dominant purpose - evidence is required to establish the circumstances for the creation of the document/communication
- Dominant purpose: “purpose which was the ruling, prevailing, or most influential purpose” – *FCT v Spotless* (1996)
- The common law test for purpose is also the dominant purpose test: *Esso Australia Resources Ltd v Commissioner of Taxation* (Cth) (1999)
- Dominant test was expresses as “clear paramountcy should be the touchstone” in *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002)
- The dominant purpose is to be determined objectively, but the subjective purpose will always be relevant and often decisive

Public Interest Immunity

- Public interest immunity protects information or a document when it is in the public interest for there to be no disclosure
- A privilege that can be raised by the court on its own
- **Balancing exercise** – whether, in all the circumstances, the public interest in protecting the confidentiality of information outweighs the countervailing public interest in the public availability of information
- Where the court believes ordering production of the document would “put the interest of the state in jeopardy” is must decline to order production: *Conway v Rimmer* [1986] AC
- *Egan v Chadwick* (1999) 46 NSWLR 563: essentially incommensurable factors (significance of the information to the issue in trial vs. public harm from disclosure)
Sankey v Whitlam (1978) – Common law basis for statutory ‘balancing test’ for PII

- ‘The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two interests that may conflict’
- Referring here to their interest that:
  1. No harm be done to the nation by disclosure of certain documents and;
  2. Their other interest that the administration of justice shall not be frustrated by the withholding of documents that must be produced if justice is to be done. – Gibbs ACJ

Standing and Procedure for PII Claims

- A claim of PII may be made by any person, including a person who is not party to the proceedings
- PII cannot be waived
- Claim usually supported by an affidavit
  - Such an affidavit may contain information which, if disclosed, would itself be injurious to the public interest
  - Permissible for the courts to use confidential affidavits in support of a PII claim
  - No right to cross-examine a deponent of an affidavit who provides evidence in support of a PII claim

Examples of Types of Information where a PII Claim could be made

- Information where disclosure could prejudice the functioning of government: State of New South Wales v Public Transport Ticketing Corporation [2011] NSWCA 6
- Documents that reveal the identity of police informers – police would be hindered in their duty of preventing and detecting crime: Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL [2011]
- Documents containing confidential police methodology – could harm the proper conduct of law enforcement activities
- Information that could harm national security: National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

Negotiation Privilege

- Protects information created in an attempt to settle a dispute
- Rationale: restrict the ability of information to be used against one party if the dispute eventually goes to litigation – participate in good faith
- No judicial discretion to determine whether privilege attaches to communications

Field v Commissioner for Railways (1957)

- Application of negotiations privilege
- In process of negotiating settlement, plaintiff was examined by doctor appointed by defendant
- Plaintiff made an admission
- Although saw doctor due to negotiations, court found that this was outside the scope of the privilege because the doctor visit was not reasonably incidental to the negotiations – it was made without any proper connection with any purpose connected with the settlement of the action
- Therefore doctor’s evidence was admissible

Waiver of Privilege

Ways in which privilege may be waived:

1. Waiver by intentional disclosure – knowing and voluntary disclosure: section 122 Evidence Act
2. Inadvertent waiver
   a. Court reluctant to find privilege waived where possibly inadvertent, by lawyer error: ERA v Armstrong
   b. Clerical error is not knowing and voluntary: Fenwick v Wambo Coal Pty Ltd
   c. Distinguish inadvertent disclosure from disclosure based on an erroneous belief that the document is not privileged – in the latter situation, privilege is waived if disclosure was made knowingly and voluntarily: Fenwick v Wambo
3. Waiver by disclosure to a third party
   a. Not a waiver unless, by the client’s conduct, they have either expressly or impliedly acted in a way that is inconsistent with the maintenance of privilege: Mann v Carnell (1999), section 122 Evidence Act
### Adjournments
- An adjournment is the postponement or delay in proceedings
- **Section 66 of CPA** provides court with discretion, in appropriate circumstances, to grant an adjournment of proceedings or any aspect of proceedings
- Must adjourn to a ‘specified day’
- Fact that both parties consent to adjournment does not necessarily mean it will be granted

**Bank of Western Australia v Callipari [2011]**
- Power to grant an adjournment must be exercised in accordance with the overriding purpose principles of the CPA
- If an adjournment is granted, the party whose conduct is responsible for the adjournment is usually ordered to pay the costs incurred by the other party(s) as a result of the adjournment
- Must ultimately do ‘what is necessary to do justice between the parties’ (**City of Sydney Council v Satar [2007]**)

**Spencer v NSW Minister for Climate Change and the Environment**
- McColl JA: there is no right to adjournment – exercised in consideration with the just, quick and cheap resolution of the issues

**Aon v ANU**
- An application which has the effect of adjourning a civil trial, a court should consider the following matters:
  a) The need to maintain public confidence in the judicial system
  b) Inefficiencies in the use of resources arising from adjournments
  c) Whether there would be an unfair prejudice in delaying proceedings unnecessarily
  d) Specific terms of the legislation or rules of court called upon as a source of power for the granting of the orders sought

### Abuse of Process and the Doctrine of Finality
- **Res judicata**: ‘a thing judges’ – parties cannot re-litigate matters
- Issue estoppel: prevents new claim that would require new court to reconsider an issue already determined in prior proceedings
- Anshun estoppel: prevents parties from bringing new claims that should have been addressed in previous proceedings
- Courts – must distinguish between claims that are separate and entitled to be subject of new proceedings and those that must be run in single proceeding

### Default Judgment
- Applies to proceedings commenced by a statement of claim
- It is a judgment entered by virtue of court rules rather than one ordered by court based on evidence
- Can be entered if the defendant is in default under rule 16.2 of UCPR
- Intended to provide an incentive for defendants to file an appearance or defence within the prescribed time period (28 days)
- The effect of a default judgment is the same as a judgment given after trial
- The court has the power to set aside a default judgment on application by the defendant, provided they can adequately explain the delay and show there is a defence to the claim that has merit
- Default judgment will depend on whether the plaintiff’s claim is liquidated or unliquidated

1. **Liquidated claim**: amount claimed is known or can be calculated by a formula or scale without recourse to assessment or opinion – application for a default judgment is made pursuant to Rule 16.6 which requires an affidavit in support
2. **Unliquidated claim**: usually case managed pursuant to sections 56 and 57 CPA

**Borowiak v Hobbs [2006]**
- Court said that if the defendant contesting the default judgement has a bone fide defence, then the court will be reluctant not to set aside the default judgment and decide the case on its merits
- In this particular case, the default was extreme: ‘No evidence that D’s insurer had any regard to the time limits imposed by the rules for the filing of defence
- They were either disregarded entirely or treated with distain or indifference...the court must seek to give effect to the overriding purpose’
National Australia Bank Ltd v McCann (No. 2) [2010]

- Facts: default judgment entered – applied 3 times to set aside
- Held: failed on third application to set aside judgment - was an abuse of process (oppressive to the other party)
- A further application which is as deficient as the earlier application, and when no real effort has been made to deal with the issues clearly pointed out in the earlier judgment that resulted in the earlier application failing
- Making a further application on that basis seems to be unjustifiable oppressive to the other party – brings the administration of justice into disrepute

Summary Disposal

- Summary disposal is a label used to describe applications to the court that can result in proceedings being concluded before a trial
- Usually provided for in UCPR
- Standard for summary judgment or summary dismissal has been lessened in some courts such as the Federal Court
- Section 31 Federal Court of Australia Act 1976 provides that judgment may be entered where a party has no reasonable prospects of successfully defending or prosecuting the proceedings
- An order for summary dismissal where there has not been a hearing on the merits of the claim will not prevent the plaintiff from issuing fresh proceedings
- An important concern for the plaintiff will be to ensure the statute of limitation has not expired
- Unsuccessful party also has the option to appeal the order for summary dismissal
- Mostly a matter of judicial discretion – courts must weigh the desire to be efficient and prevent unfair proceedings with the need to ensure parties are fairly heard

Summary disposition prevents the courts becoming clogged with unmeritorious litigation (thereby improving access)

vs.

Summary disposition denies parties a hearing (thereby denying access)

Summary Judgment

- Plaintiff can apply for summary judgment against a defendant under Rule 13.1
- Where the defendant has filed a defence that does not reveal a valid defence to the plaintiff’s claim or whose only defence is in regard to the amount of the damages claimed
- Deprives a party of its chance to have its case heard on the merits
- An application under Rule 13.1 can be made for the whole or part of the judgment claimed by the plaintiff
- Application for summary judgment requires the plaintiff to admit affidavit in support of the order confirming the facts that the application is based on
- An order should only be made where it is clear that there is no real issue to be tried

Dey v Victorian Railways Commissioners (1949)

- Proceedings may not be summarily dismissed unless a claim or defence can properly be described as “so obviously untenable that it cannot possibly succeed,” “manifestly groundless” or “so manifestly faulty that it does not admit of argument

E-C Commerce v Bidwell [2005] NSWCA 81

- Defendant appealed summary judgement for plaintiff made in District Court. Court of Appeal found for defendant
- Held: although the defence was very badly drafted, there were at least triable issues and summary judgement should only be made when there are no real issues
- Sufficient uncertainty as to the existence and form of the agreement, whether it was breached and who exactly was involved
Summary Dismissal

- The defendant’s corresponding right to the plaintiff’s right to apply for a summary judgment: Rule 13.4
- Effect: you can still bring fresh proceedings (s 91 CPA) or appeal summary dismissal to the Court of Appeal
- Frivolous: not worth serious attention [husband bumper sticker case – dismissed as a “waste of public money”]
- Vexatious: undertaken for the purpose of harassment, a proceeding that cannot succeed or is intended to waste time or cause delay
- Categories of claims that are an abuse of process are not closed but may include:
  1) Proceedings involve a deception of the court, sham, fiction
  2) Proceedings where court processes are not being fairly or honestly used but rather employed for some ulterior or improper purpose
  3) Proceedings that are manifestly groundless
  4) Multiple or successive proceedings likely to amount to harassment
  5) Proceedings where it is impossible for the defendant

Van Der Lee v NSW [2002] NSWCA 286

- Facts: the State of NSW was the defendant in eight proceedings relating to the landslide in Thredbo in 1997 – the State cross-claimed against Lend Lease Corporation seeking damages, contribution and/or indemnity
- Cross-claimants filed notices of motion seeking the cross-claims be stayed or dismissed as an abuse of process
- Lease Land failed to fulfil their onus to show the the State acted for the predominant purpose of gaining a collateral advantage, or a benefit not reasonably related to such judgment

Fawcett v Cannon [2007] NSWCA 1267

- Facts: Geoffrey Cannon placed a very large firework inside a mortar tube and lit it, expecting it to launch into the sky and explode – the firework did not launch but exploded on the ground causing serious injuries to Justin Fawcett – Fawcett sues Cannon and the wholesale suppliers of the fireworks, the retailers and a number of other companies
- Schofield Companies moved to dismiss the proceedings – submitted the proceedings were an abuse of process and seek dismissal – suing them because he ultimately did not know who was liable
- Must be “impossible for the party concerned to succeed on his claim”
- The facts on which the Schofield companies relied were not accepted – not possible to say the plaintiff can’t succeed or that proceedings are unjustifiable
- Possible that any one of the Schofield companies could have been involved in the sale

Dismissal for Want of Prosecution

- A claim or defence can be dismissed for a party failing to proceed with due dispatch: UCPR 12.7
- Case management has made this less frequent
- Court has inherent power to dismiss a claim, strike out defence or make other order
- Court will consider overriding purpose principles in ss56-60 of CPA regarding ‘just, quick and cheap’ resolution

Building Insurers’ Guarantee Corporation v Touma [2010] NSWSC 4

- Facts: Touma was a builder – he contracted to constructed 26 villas with the second defendant – second defendant owned the property – plaintiff alleges Mr. Touma and the second defendant constructed the villas in a defective way – Touma failed to conduct various steps in the proceedings that were ordered such as discovery, sought numerous adjournments (unwell, overseas, changing solicitor) – plaintiff filed a motion to strike out Mr. Touma’s defence
- Defence struck out – plaintiff’s conduct was otherwise faultless and unarmed with any power to control what occurs
- Had no attended to his side of the litigating in a timely manner, has disregarded his obligation to conform to directions that have been made
- Cannot continue to seek adjournments in the hope that the inconvenience and disruption will become the problem of the plaintiff

Phornpisutikul v Mileto [2006]

- D filed notice of motion for dismissal under r12.7 on basis that proceedings going since 2003 – more than 12 months since P ordered to file affidavits and plaintiff had ‘Not filed a single piece of paper that advances her case in chief’
- ‘There is some reluctant to dismiss a case where there has not been a hearing on the merits. However, a party may by her own conduct prevent a hearing taking place where by repeated failures to comply with directions, she demonstrates that she is not prepared to play her part in expeditious advancing of the proceedings.’
**Discontinuance**

- Procedure that allows a plaintiff to terminate proceedings against a defendant because they no longer wish to continue the litigation
- May be due to a lack of resources, acceptance that the claim will fail, or because the matter has been resolved as a result of some form of ADR or offer of compromise
- A party who discontinues must ordinarily pay the other party's costs of the discontinued claim unless the court otherwise orders or the notice of discontinuance makes some other provision
- Discontinuance does not bar subsequent proceedings unless the discontinuance was on the terms that no new proceedings would be brought
- A plaintiff will not normally be forced to continue to litigate as long as there will be no injustice caused to the defendant

*Covell Matthews & Partners v French Wools Ltd [1997]*

- Court will review all relevant circumstances and consider whether ‘the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved.’

**Security for Costs**

**Costs in Litigation**

- Costs orders are a significant aspect of most civil litigation
- Typical costs orders: no order as to costs or costs in the cause
- A defendant may obtain a security for costs order to ensure another can pay an adverse order
- *Section 98 Civil Procedure Act* – courts’ power as to

**Security for Costs**

- The court has power to order a plaintiff to give security for the defendant’s cost of defending the plaintiff’s claim and can order a stay of proceedings until the security is given
- An application for security for costs should be made promptly, before the plaintiff has expended money on claim
- Unlikely to be granted where the plaintiff’s claim bona fide and reasonable prospects of success
- If there is non-compliance with a security for costs order, the court may order the plaintiff’s proceedings be dismissed: UCPR rule 42.21
- The fact that a natural person lacks resources is not a sufficient reason for a security for costs order – impecuniosity may be a result of the defendant’s conduct
- The impecuniosity of the plaintiff is a factor to be weighed in the exercise of the discretion and is neither a sufficient condition for the ordering of security nor a sufficient condition for the Court to decline the order for security: *Lucas v Yorke (1983)*
- A security for costs order is discretionary and though such discretion is absolute and unfettered, it will not be made automatically – it must not be made “arbitrarily or so as to frustrate the legislative intent
- Effect is to stay proceedings until security is given (may be dismissed if security is not given)
- More likely to be granted against a corporation than a natural person
- Supreme Court has inherent jurisdiction to order security for costs which are ‘necessary for due administration of justice and prevent abuse of the court’s processes’ – *Rajski*

*Idapport v National Australia Bank [2001] NSWSC 744*

- Discretion to award security for costs requires to take into account all relevant facts and circumstances
- 7 guidelines the court is said to typically take into account (*KP Cable Investments*)
  1. Such applications should be brought promptly
  2. Regard is to be had to the strength and bona fides of the applicant’s case
  3. Whether the applicant’s impecuniosity was caused by the respondent’s conduct subject of the claim
  4. Whether the application for security is oppressive (to deny the right of an impecunious applicant to litigate)
  5. Whether there are any persons standing behind the company who are willing to provide the necessary security
  6. Whether persons standing behind the company have offered any personal undertaking to be liable for the costs
  7. Security only ordered against a party who is in substance a plaintiff, and an order ought not to be made against parties who are defending themselves
Incentives to Settle

- Settlement is the most common way matters are disposed of without trial
- Settled proceedings must be discontinued
- Settlement offers can affect costs orders where settlement fails and the matter proceeds to trial
- The UCPR offer of compromise procedure and the common law ‘Calderbank letters’ are designed to encourage a reasoned approach to settlement by plaintiffs and defendants (in addition to formal ADR options)
- Offer to settle must be genuine and if the offer is unreasonably rejected cost consequences can follow
- If the settlement offer is rejected, the matter goes to trial – adverse costs order can be made against the rejecting party if the outcome is less favourable than the settlement offer
- Offer may be from either side
- Offers of compromise regulated by UCPR

Calderbank Letters

- Calderbank letters are offers of compromise in letters marked ‘without prejudice save as to costs’ – they are a procedural alternative to offers of compromise under the UCPR
- The cost consequences of unreasonably rejecting an offer contained in a Calderbank letter is in the general discretion of the court rather than the UCPR rules that govern offers of compromise
- Calderbank letters lack the certainty and explicit consequences of the UCPR formal system of offers of compromise
- Calderbank letters and UCPR offer of compromise are designed to encourage a reasoned approach to the settlement by both plaintiffs and defendants
- Calderbank letters:
  - Offers of compromise in letters marked “without prejudice save as to costs”
  - Offer to settle must be genuine
  - If the offer is unreasonably rejected, cost consequences can follow (general discretion of the court)
- Calderbank letters lack the certainty and explicit consequences of the UCPR formal system of offers of compromise
- More flexible than offers of compromise (rules are increasingly flexible)

Example Adverse Cost Orders

Example 1

Plaintiff serves offer of compromise on 4/1/16 for $1,000,000 plus costs as agreed or assessed. Defendant rejects the offer. Judgment entered for $2,000,000 on 22/3/16 – What type of cost order will the plaintiff apply for?

- Defendant would have been better off if they had not rejected the offer
- Plaintiff can apply for indemnity costs for the remainder of the period
- Costs up to the date of the offer calculated on an ordinary basis

Example 2

Defendant serves offer of compromise on 4/1/16 for $1,000,000 plus will pay plaintiff’s costs as agreed or assessed. Plaintiff rejects the offer. Judgment entered for $500,000 on 22/3/16 – What type of costs order will the defendant apply for?

- Plaintiff worse off than what the defendant originally offered
- Plaintiff will get ordinary costs up to the date of the offer
- Defendant will get indemnity costs from the offer of compromise up to and including the trial

Brief Summary of the Conduct of a Civil Hearing

The way a trial is run is dependent on

1. The court
2. The division
3. The number of parties
4. The dispute – what is in issue for determination
5. The evidence
6. The judge
**How is a Hearing Conducted:** where the plaintiff bears the burden of proof (most common test)

**Governed by UCPR**

- Plaintiff gives opening address
- Plaintiff calls evidence
- Plaintiff closes evidentiary case
- Defendant can open case – may give address
- Defendant may call evidence
- Defendant closes evidentiary case
- Defendant addresses court
- Plaintiff addresses court
- Note: if defendant does not call evidence then plaintiff must address first

**Conclusion of Trial**

- Not usually juries in civil proceedings (exception: defamation)
- If there is a jury, the jury makes findings of fact and are then discharged
- Usually judges make findings of fact as part of their judgment
- Judgment contains orders made by the court
- Judgement is entered by the orders being entered

**Appeals**

- An appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court: *CBA v Bank NSW* (1949)
- Most judgments are not appealed
- The reasons for creating avenues of appeal:
  a) To allow for the correction of errors of law or facts or the miscarriage of justice of the exercise of a discretion
  b) To allow for the development of the law
- There is no appeal at common law: *Fox v Percy* (2003)
- Appeals are a creature of statute – therefore necessary to examine the statute that provides for an appeal from that particular tribunal
- Time limits apply to all appeals and applications for leave to appeal
- Appeals in Court of Appeal are subject to very strict procedural rules re: process and documents (*UCPR*)

**Access to Appeals**

1. **Appeal as of right**
   - There is an appeal as of right from the Supreme Court to the Court of Appeal against final judgments and orders where an error of law, fact or discretion can be shown: *Supreme Court Act 1970 section 101(1)*
   - There is an appeal as of right from the District Court in respect of an amount of $100,000 or more: *District Court Act 1973*

2. **Where leave to appeal is required**
   - The requirement of leave to appeal is designed to restrict the appeal procedure to appropriate matters and thereby to promote the efficiency of the court’s appeal procedures: *Coulter v R (1988)*
   - Appeals from interlocutory orders require leave
     i. Section 101(2) *Supreme Court Act 1970*
     ii. Section 127(2) *District Court Act 1973*

3. **Appeals to the High Court** – require special leave and everyone gets 20 minutes to present their case: *Judiciary Act 1903 section 35*

**Possible Outcomes**

1. Appeal dismissed
2. Appeal allowed
   i. Set aside judgment, and
   ii. Enter new judgment, and/or
   iii. Set down for rehearing (e.g. “remit to trial judge for quantum”)