

Introduction to Civil Practice: Jurisdiction and Guiding Principles

Procedural law is the law which governs the conduct of proceedings before the court

Rules of civil procedure can be statutory (Civil Procedure Act) or inherent (deriving from their status as a superior court)

In the two main litigation models, adversarial and inquisitorial two different methods of fact-finding exist:

- Adversarial – Legal parties have responsibility for mounting their own case; they present the facts.
- Inquisitorial – Judiciary is both proactive/inquisitive and this greater directorial role played by the judge/s means parties are less able to direct their own case

Open justice plays a huge role in the Australian civil law system – involves the concept that the public is able to enter a court freely and see justice take place (although there are exceptions; family law matters, sexual assault matters etc.)

Human Rights Challenges to Civil Justice System include the right to a fair hearing, which can sometimes counterbalance the traditional/evolving civil procedures → eg in *Hodgson v Amcor Ltd*; where a statement was served well after the due date, and the justice allowed the statement to be admissible → “In this case, the balance between case management considerations and the dictates of a fair trial falls squarely in favour of permitting Mr Conn to be called by the Amcor parties”

Efficiency vs Delay

- Issues previously existed in the Australian Civil system where cases were taking far too long to reach a judgment, resulting in significant costs.
- The issue has then arisen about whether the law can be more efficient and speedy with its judgment.
- Zuckerman says: “The needs of the community may be better served by faster and simple proceedings, albeit at some cost to accuracy, than by a highly accurate procedure in which delays can rob judgments of their utility and in which expense places the protection of the law beyond the reach of the great majority.”
- He also says: “A just procedure must aim at achieving correct results, but it need not always achieve this aim in order to remain a just procedure.”

Jurisdiction

Subject Matter Jurisdiction

High Court

Original Jurisdiction – ss 75 – 77 of the Constitution

Appellate Jurisdiction – s 73 of the Constitution

Federal Court

Original Jurisdiction – s 19 of the Federal Court of Australia Act; “The court has such original jurisdiction as invested in it by laws made by the Parliament.”

Appellate Jurisdiction – Pt III Div 2 of FC of Australia Act; namely appeals from original jurisdiction of the Court, Supreme Court matters, or other Federal Circuit Court original jurisdiction matters.

Reference Jurisdiction – Under s25(6) of the Federal Court of Australia Act, single judge can refer question to full bench of Federal Court

Associated Jurisdiction – Can hear federal claims that are outside the Court’s jurisdiction but associated with claims that are within the court’s primary jurisdiction → In *Fencott* It was said: “In the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim be joined in a proceeding are within the scope of one controversy and thus within the ambit of the matter.”

Incidental Jurisdiction – FC’s powers extend to “whatever is incidental and necessary to the exercise of that jurisdiction and to the exercise of any powers conferred by legislation.”

Supreme Courts

Original + Appellate Jurisdiction – Anything deemed necessary to administer justice in the state/territory that it operates in

Federal Jurisdiction – State courts do not have jurisdiction of matters under s75 of the Constitution, but do have s 39(2) of the Judiciary Act does invest state courts with federal jurisdiction in all matters in which the HC has original jurisdiction/can have original jurisdiction conferred upon it.

Inherent Jurisdiction – includes all powers necessary to enable it to act effectively, control its own proceedings, and prevent obstruction or abuse of its process.

Territorial Jurisdiction

For an action *in personam*, D must be present in the jurisdiction – *Laurie v Carroll* (1958)

D may also voluntarily submit to the jurisdiction – there will be no voluntary submission where the D files a conditional appearance and applies to the court to set aside orders on the basis that the court did not have jurisdiction to make them because of significant defects in the service of the original service: *Robinson v Kuwait Liaison Office*

Statutory extension of territorial jurisdiction – court may also have *in personam* jurisdiction over a D who is OUTSIDE the jurisdiction and validly served with the proceeding; in Australia, Service and Execution of Process Act guarantees Australia-wide *in personam*

Cross-Vesting Jurisdiction

- Scheme confers/invests original/appellate jurisdiction of one court to another participating court – i.e. NSW Supreme Court O/A jurisdiction to SA Supreme Court.
- Also allows for proceedings to be transferred to the best suited court
- *Re Wakim* decided that state jurisdictions cannot confer their state jurisdiction onto federal courts

Transfer of Proceedings

- Under s 5 of Jurisdiction of Court (Cross-Vesting) Act 1987, proceedings can be transferred to a more appropriate court.

Two distinct circumstances are provided for by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* for the transfer of proceedings:

- Where ‘related’ proceedings have been commenced in different courts participating in the cross-vesting scheme – only have to be causally related
- Whether the case is within the court’s original jurisdiction and/or whether it is appropriate for the court to hear the case → paying attention to whether, apart from CV legislation, the case would have been incapable of being instituted in court in question, the extent to which the case involved an issue of the appropriation, interpretation or validity of a law of the receiving court, the interests of justice.

BHP Billiton Ltd v Schultz – deals with the question of what are the interests of justice? “Weighing considerations of cost, expense, and convenience, even when they conflict, is a familiar aspect of the kind of case management involved in many cross-vesting applications.”

In *Amor v Macpact Pty Ltd*, the fact that most of the “major witnesses” resided in/near Brisbane was a significant factor in the court’s decision to hold a trial concerning an accident that occurred in Brisbane, in Brisbane, as opposed to Coff’s Harbour, where the plaintiff resided.

Applicable Law

- BASIC RULE: The law of where the court is sitting is to apply - *Jurisdiction of Courts (Cross-Vesting) Act 1987* s 11
- QUALIFICATION ONE: Where the action arises under the law of another state or territory: s 11(1)(b)
- QUALIFICATION TWO: In relation to the rules of evidence and procedure, the applicable rules will be those that the court ‘considers appropriate in the circumstances’: s 11(1)(c)

When **Special Federal Matters** (PT IV of the C&C Act, s60G of Family Law Act, Commonwealth Tribunal appeals/q’s of law etc.), these are to go to the Federal Court (.. s 6(1),(2),(3) ..) unless there are special reasons for the case to remain in the Supreme Court apart from convenience of the parties.

When dealing with matters before **Inferior courts**, s 8 of *Jurisdiction of Courts (Cross-Vesting) Act 1987* allows the Supreme Court to remove the proceeding from an inferior court and bring it to the Supreme Court to determine whether it needs to be transferred in accordance with the cross-vesting scheme.

- S 10 allows FC, Family Court or Supreme Court of a state/territory to transfer an inferior state court proceeding that is otherwise within that inferior court's jurisdictional limits, if the proceeding involves a matter arising under certain parts of Consumer and Competition Act

In NSW under the *Uniform Civil Procedure Rules*

- Applications by the Attorney General do not make them party to proceedings: r 44.4
- A party who contends that cross-vesting scheme should be applied, should make application to court as soon as practicable after commencement of proceedings: r 44.5
- A party who wishes to contend that another state/territory's laws or rules of evidence/procedure should apply, shall as soon practicable file notice of contention and service the notice on the other parties – this contenting must specify the law/grounds relied on in support of contention: r 44(6)(1)

Development of Overriding Purpose

The **Overriding Purpose** is a philosophy that is expressed in legislation or court rules that "The court must manage litigation to bring cases to an early and economical disposition consistently with the needs of justice."

Civil Procedure Act 2005 (NSW)

56 Overriding Purpose

(1) The overriding purpose of this Act and of rules of [court](#), in their application to [civil proceedings](#), is to facilitate the just, quick and cheap resolution of the real issues in the [proceedings](#).

57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56

(1), [proceedings](#) in any [court](#) are to be managed having regard to the following objects:

- (a) the just determination of the [proceedings](#),
- (b) the efficient disposal of the business of the [court](#),
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the [proceedings](#), and all other [proceedings](#) in the [court](#), at a cost affordable by the respective parties.

(2) This Act and any rules of [court](#) are to be so construed and applied, and the practice and procedure of the [courts](#) are to be so regulated, as best to ensure the attainment of the objects referred to in subsection (1).

In *Haplin v Lumley General Insurance Ltd*, Justice Basten asserted:

- S 56 cannot be read in isolation, and must be "read .. in a statutory context which includes at least ss 57 and 58

58 Court to follow dictates of justice

- (1) In deciding:
- (a) whether to make any order or direction for the management of [proceedings](#), including:
 - (i) any order for the amendment of a document, and
 - (ii) any order granting an adjournment or stay of [proceedings](#), and
 - (iii) any other order of a procedural nature, and
 - (iv) any direction under Division 2, and
 - (b) the terms in which any such order or direction is to be made, the [court](#) must seek to act in accordance with the dictates of justice.
- (2) For the purpose of determining what are the dictates of justice in a particular case, the [court](#):
- (a) must have regard to the provisions of sections 56 and 57, and
 - (b) may have regard to the following matters to the extent to which it considers them relevant:
 - (i) the degree of difficulty or complexity to which the issues in the [proceedings](#) give rise,
 - (ii) the degree of expedition with which the respective parties have approached the [proceedings](#), including the degree to which they have been timely in their interlocutory activities,
 - (iii) the degree to which any lack of expedition in approaching the [proceedings](#) has arisen from circumstances beyond the control of the respective parties,
 - (iv) the degree to which the respective parties have fulfilled their duties under section 56 (3),
 - (v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the [proceedings](#), whether under rules of [court](#), the practice of the [court](#) or any direction of a procedural nature given in the [proceedings](#),
 - (vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,
 - (vii) such other matters as the [court](#) considers relevant in the circumstances of the case.

59 Elimination of delay

In any [proceedings](#), the practice and procedure of the [court](#) should be implemented with the object of eliminating any lapse of time between the commencement of the [proceedings](#) and their final determination beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for [trial](#).

60 Proportionality of [costs](#)

In any [proceedings](#), the practice and procedure of the [court](#) should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

61 Directions as to practice and procedure generally

- (1) The [court](#) may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of [court](#)) for the speedy determination of the real issues between the parties to the [proceedings](#).
- (2) In particular, the [court](#) may, by order, do any one or more of the following:

- (a) it may direct any party to [proceedings](#) to take specified steps in relation to the [proceedings](#),
- (b) it may direct the parties to [proceedings](#) as to the time within which specified steps in the [proceedings](#) must be completed,
- (c) it may give such other directions with respect to the conduct of [proceedings](#) as it considers appropriate.

(3) If a party to whom such a direction has been given fails to comply with the direction, the [court](#) may, by order, do any one or more of the following:

- (a) it may dismiss the [proceedings](#), whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular [claim](#),
- (b) it may strike out or limit any [claim](#) made by a [plaintiff](#),
- (c) it may strike out any defence filed by a [defendant](#), and give [judgment](#) accordingly,
- (d) it may strike out or amend any document filed by the party, either in whole or in part,
- (e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
- (f) it may direct the party to pay the whole or part of the [costs](#) of another party,
- (g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the [court](#) may have to take action of the kind referred to in that subsection or to take any other action that the [court](#) is empowered to take in relation to a failure to comply with a direction given by the [court](#).

Pre-litigation and Case Management; Litigation Technology

Case Management

WHAT IS CASE MANAGEMENT?

Conscious decision of the Courts & legislature to overcome unacceptable delay & costs and promote the civil legal system as an administrator of justice for all.

It involves

- Obligation to engage in case preparation at a very early stage
- Imposition of routine requirements on parties to exchange documents/information within certain time periods
- Different tracks for different sorts of cases
- Promotion of ADR
- Review by Judges or Registrars to ensure compliance
- Sanctions available for non-compliance e.g. Strike out, dismissal & cost orders.

WHY IS NECESSARY?

- Self-Interested parties and practitioners had lead to the dual problems of lengthy delay and increasing costs
- Lengthy and costly cases meant only the wealthy could afford to litigate
- Costs were disproportionate to the value of the case
- Transparency of the process is crucial to the public perception of the legal system as being fair.
- Fair procedures make losing more acceptable
- Access to justice for all.

OBJECTS OF CASE MANAGEMENT

- Just determination of proceedings
- Efficient disposal of business of the court
- Efficient use of court time and resources
- Timely disposal of proceedings
- Affordable process
- Elimination of unnecessary delay

Case Management is implemented by directions hearings or status conferences → CPA Part 6 Division 2

- S61 (1)- any direction it thinks fit for speedy determination of real issues between the parties
- S61(2)-any directions as to steps to be taken, the time to be completed and any other directions with respect to the conduct of proceedings as sees fit.

- S61(3)-if a party fails to comply with any directions the court may dismiss or strike out any proceedings or defence, enter judgement, order costs against a party and make any other order considered appropriate.

What is Alternative Dispute Resolution – ADR

Mediation → Neutral third party (mediator) assists parties to identify issues involved in the dispute and helps them to develop options for resolution/agreement

- Cost and time effective
- Voluntary
- Informal (no rules of evidence etc.)
- Parties are in control
- Privileged – nothing can be used in courts proceedings unless all parties agree

Arbitration → An arbitrator is appointed by the court or the parties to resolve all or some of the issues in dispute, within an agreed time-frame

- Arbitrators given guidelines by the *NSW Law Society* in the *Private Arbitration Kit* – which says, among other things:
 - Arbitrator must be impartial, and appear impartial
 - Each participant be afforded reasonable opportunity to take an appropriate part in the process
 - Arbitrator must give reason for decision – analysis, which evidence was accepted/rejected
 - Arbitrator must complete any task involved in the arbitration process in a diligent manner and as reasonable in the circumstances (no longer than 8 weeks for award)

Early neutral evaluation → Evaluator identifies strengths/weaknesses of the parties' positions and highlights areas of agreement; issuing assessment of merits of the case

Expert determination → Provide a binding or non-binding decision of all the issues in the dispute, or one specific issue. Usually chosen for legal expertise, and will use their legal knowledge

Adjudication → Similar to a court, where the adjudicator reviews evidence/submissions and determines rights/obligations of the parties

Conciliation → While not making any determination, conciliator may advise on process of conciliation, recommendation for terms of settlement, give expert advice on likely settlement terms, and actively encourage participants to reach an agreement

Negotiation and ADR → Person facilitating negotiation will only advice/determine process for negotiation, not the issues or outcome.

Court-Annexed ADR

Alternative dispute resolution has grown for two reasons:

- Increased incorporation/referral/use by courts of mediation and arbitration processes
- Procedural requirement to take genuine or reasonable steps to resolve a dispute before litigation

The Civil Dispute Resolution Act deals with the court-annexed ADR in the Federal jurisdiction

Civil Dispute Resolution Act → Commonwealth Jurisdiction; not State

4 Genuine steps to resolve a dispute

(1A) For the purposes of this Act, a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

(1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:

- (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
- (b) responding appropriately to any such notification;
- (c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;
- (d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
- (e) if such a process is agreed to:
 - (i) agreeing on a particular person to facilitate the process; and
 - (ii) attending the process;
- (f) if such a process is conducted but does not result in resolution of the dispute--considering a different process;
- (g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

(2) Subsection (1) does not limit the steps that may constitute taking genuine steps to resolve a dispute.

5 Definitions

In this Act:

"*applicant* in proceedings" means a person who institutes the proceedings.

"*application*" means an [application](#) (however described) by which civil proceedings are instituted.

"*civil penalty provision*" means a [civil penalty provision](#) however described.

"*Commonwealth authority*" means a body corporate established for a public purpose by or under a law of the Commonwealth.

"*eligible court*" means the following:

- (a) the Federal Court of Australia;
- (b) the Federal Magistrates Court.

"*excluded proceedings*" means proceedings that are [excluded proceedings](#) under Part 4.

"*genuine steps statement*" :

- (a) for an applicant--see section 6;
- (b) for a [respondent](#)--see section 7.

"lawyer" has the same meaning as in the [Federal Court of Australia Act 1976](#) .

"respondent" in proceedings means a person against whom the proceedings are instituted.

6 Genuine steps statement to be filed by applicant

(1) An applicant who institutes civil proceedings in an [eligible court](#) must file a [genuine steps statement](#) at the time of filing the [application](#).

(2) A [genuine steps statement](#) filed under subsection (1) must specify:

(a) the steps that have been taken to try to resolve the issues in dispute between the applicant and the [respondent](#) in the proceedings; or

(b) the reasons why no such steps were taken, which may relate to, but are not limited to the following:

(i) the urgency of the proceedings;

(ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

(3) A [genuine steps statement](#) need not be filed under subsection (1) in relation to proceedings that are wholly [excluded proceedings](#).

(4) A [genuine steps statement](#) must be filed under subsection (1) in relation to proceedings that are in part [excluded proceedings](#), but the statement need not relate to the parts of the proceedings that are [excluded proceedings](#).

7 Genuine steps statement to be filed by respondent

(1) A [respondent](#) in proceedings who is given a copy of a [genuine steps statement](#) filed by an applicant in the proceedings must file a [genuine steps statement](#) before the hearing date specified in the [application](#).

(2) A [genuine steps statement](#) filed under subsection (1) must:

(a) state that the [respondent](#) agrees with the [genuine steps statement](#) filed by the applicant; or

(b) if the [respondent](#) disagrees in whole or part with the [genuine steps statement](#) filed by the applicant-- specify the respect in which, and reasons why, the [respondent](#) disagrees.

8 Genuine steps statements must comply with Rules of Court

A [genuine steps statement](#) must comply with any additional requirements specified in the Rules of Court of the [eligible court](#) (see section 18) in which the statement is filed.

9 Duty of lawyers to advise people of the requirements of this Act

A [lawyer](#) acting for a person who is required to file a [genuine steps statement](#) must:

(a) advise the person of the requirement; and

(b) assist the person to comply with the require

10 Effect of requirements of this Part

(1) The requirements of this Part are in addition to, and not instead of, requirements imposed by any other Act.

(2) A failure to file a [genuine steps statement](#) in proceedings does not invalidate the [application](#) instituting the proceedings, a response to such an [application](#) or the proceedings.

FEDERAL COURTS

The [Federal Court Rules 2011 \(Cth\)](#) deals with court-annexed ADR processes under Pt 28

Under amendments to the [Family Law Act](#), mediation must be sought before filing an application in child-related proceedings

NEW SOUTH WALES

- The Civil Procedure Act 2005 permits the court to refer any proceeding to mediation, without or without the consent of the parties: Pt 4
- Under CPA, court may also refer claims for money to arbitration, after dealing with the matters that can be resolved before a hearing: s 38
- Rules for the conduct of mediations and arbitrations are found in the Uniform Civil Procedure Rules 2005 (NSW): Pt 20

Case Management and the Overriding Purpose

- Most judges have shifted from the traditional view of judging (umpire) to adopt a more active managerial stance – meeting with parties, encouraging settlement of disputes and supervising case preparation
- **Case management** → approach to the control of litigation in which the court supervises or controls the progress of the case through its interlocutory phase
- Some concepts that are seen in jurisdictions using case management include: Individual docket or master list Standardize and differential case management ... court initiate events ... alternative dispute resolution ... case management principles

In NSW, under s 57 of the Civil Procedure Act:

57 Objects of case management

(1) For the purpose of furthering the overriding purpose referred to in section 56

(1), proceedings in any court are to be managed having regard to the following objects:

- (a) the just determination of the proceedings,
- (b) the efficient disposal of the business of the court,
- (c) the efficient use of available judicial and administrative resources,
- (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

- S 57 states the objectives of NSW case managements – “just determination of proceedings ... the efficient disposal of the business of the court ... the efficient use of available judicial and administrative resources ... the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”
- NSW Supreme Court uses extensive differential management system – involving greater differentiation between the types of matters that are subject to case management.

Referral to alternative dispute resolution:

- Under s 26 and 28 of the CPA, the court may make an order for meditation, with or without the consent of the parties

Civil Procedure Act 2005 (NSW)

26 Referral by [court](#)

- (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.

27 Duty of parties to participate

It is the duty of each party to [proceedings](#) that have been referred for [mediation](#) to participate, in good faith, in the [mediation](#).

28 Costs of [mediation](#)

The [costs](#) of [mediation](#), including the [costs](#) payable to the [mediator](#), are payable:

- (a) if the [court](#) makes an order as to the payment of those [costs](#), by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves.

25 Definitions

(cf Act No 52 1970, sections 110I and 110J; Act No 9 1973, sections 163 and 164; Act No 11 1970, sections 21J and 21K)

In this Part:

"mediation" means a structured negotiation process in which the [mediator](#), as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

"mediation session" means a meeting arranged for the [mediation](#) of a matter.

"mediator" means a person to whom the [court](#) has referred a matter for [mediation](#).

Challenging Case Management Decisions – The Interpretation of the Overriding Purpose

- In NSW, provisions exist within the CPA to provide sanctions and support the overriding purpose/case management (s 61)

61 Directions as to practice and procedure generally

(1) The [court](#) may, by order, give such directions as it thinks fit (whether or not inconsistent with rules of [court](#)) for the speedy determination of the real issues between the parties to the [proceedings](#).

....

(3) If a party to whom such a direction has been given fails to comply with the direction, the [court](#) may, by order, do any one or more of the following:

- (a) it may dismiss the [proceedings](#), whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular [claim](#),
- (b) it may strike out or limit any [claim](#) made by a [plaintiff](#),
- (c) it may strike out any defence filed by a [defendant](#), and give [judgment](#) accordingly,
- (d) it may strike out or amend any document filed by the party, either in whole or in part,
- (e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
- (f) it may direct the party to pay the whole or part of the [costs](#) of another party,
- (g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the [court](#) may have to take action of the kind referred to in that subsection or to take any other action that the [court](#) is empowered to take in relation to a failure to comply with a direction given by the [court](#).

Pre Civil Procedure Act Example: *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146

= Parties were engaged in a long running dispute concerning a lease to develop certain land. The D's applied to amend their defence, with all but one of the amendments allowed. It was argued by the presiding justice that maintaining the trial date (which had been fixed for 6 months ahead) was a more pressing consideration than a party's right to a further defence. Went to appeal.

= HELD: All defences allowed: justice is the paramount aim - on appeal it was held that "a party should be permitted to raise an arguable defence provided any prejudice to other parties could be compensated by costs."

Aon Risk Services v Australian National University is the principal in the area of how much weight to give to court efficiency and the interests of the individual parties

- On the third day of a 4-week trial that had been on foot for two years, the Plaintiff applied for an adjournment and for leave to amend its statement of claim to add a substantial new claim against the Defendant. It was allowed in a lower court, with the D appealing
- HELD: Not allowed under case management principles
 - The relevant dispute had to exist at the time of application (cannot appear mid-trial)
 - Amendments that raise entirely new issues and whether it will be permitted needs to be decided by the court (giving weight to fact of substantial delay/wasted costs and effect on the parties, as well as the importance of the amendment to the party, the stage the litigation had reached, and the explanation for any delay in applying for amendment)

Pre-Litigation Checklist Before Filing a Statement of Claim

1. Is there a cause of action?
2. Who are the parties
3. Have all dispute resolution options been genuinely explored?
4. Does your client understand cost implications of commencing proceedings?
5. Does the other side have the resources to pay any judgment?
6. What are the relevant time limits?
7. What is appropriate jurisdiction?
8. Reasonable prospects of success?
9. What is the cause of action? (Contractual, negligence, tortious?)
10. Can we file more than 1 action in the same statement of claim – yes, just don't do too many because it looks like you're just fishing.
11. Where/which division of the Courts/Tribunals?
12. Who is suing whom?
13. The P must have standing – the P must be eligible to be actioned against
 - a. Must be able to enforce their rights or duties.
 - b. Private Ps (by way of disability) can sue by way of their tutor
14. All parties must be legal entities.
15. Are we taking an action against the correct defendant?
16. Who owed the duty of care?
17. The P must plead a cause of action against each named D.

Matching Disputes with Processes

Choosing between litigation and arbitration has a lot to do with:

- The identity of the parties
- The nature of the dispute
- The parties interests and preferences

ADVANTAGES OF ARBITRATION

- Procedural flexibility – *Commercial Arbitration Act* allows parties to agree on the arbitral procedures to be followed: s 19 (1). However, if the parties do not agree, the arbitrator may make a range of orders for the purposes of reducing the cost/duration.
- Privacy and confidentiality – only people that are related to the proceedings attend, but information discussed in the hearing may be divulged, and a contractual provision will need to be agreed to, to keep information suppressed
- Parties choose the decision maker – this allows parties to choose someone with expert knowledge in the area, and also enabled decision to be made on a potential decision-maker's case-management record
- Timetabling + early resolution of disputes – there is greater flexibility in the times/frequencies that hearings can take place

DISADVANTAGES OF ARBITRATION

- Cost – there are additional fees and costs associated with arbitration that parties would not have in litigation (room hiring, arbitrator's fee etc.)
- Contribution to the development of law – arbitration holds not precedential value, and will not shape/add to our understanding of law.
- Non-arbitrability of some disputes – some disputes/areas can not be decided by arbitration (taxation, workplace relations) and these are dealt with under ss 16,34(2)(b), 36(1)(b) of the *Commercial Arbitration Act*
- Disparity between the disputants in their knowledge of the predilections and practices of arbitrators – where a party, particularly corporations, have mechanisms that often refer them to arbitration, they may have advantage over a party that does not have much exposure to the system.

Causes of Change that are likely to shape future of dispute resolution

COST AND ACCESS TO JUSTICE

- Many Australians cannot afford legal representation – due to the high cost and limits of legal aid.
- The Australian Government has pushed strongly for ADR in the past – but questions are raised about whether this good; it creates a sector of society who are forced into ADR because they cannot afford litigation. ADR does not always deliver a similar experience to court; the decision may not be decided on a legal basis, and the same procedural protections are not afforded.
- Class actions are also a way for average Australians to access justice – but some have noted that these actions are only limited to ones that are profitable

MULTIPLE DISPUTE RESOLUTION OPTIONS

- A number of alternatives to litigation now exist – even with legislation that enables courts to direct matters here, and which requires litigants to make genuine attempts before commencing litigation to try and resolve the matter in an ADR environment.
- Lawyers now need to have specialist knowledge of the appropriate action to take – and are also required by legislation, such as the *Federal Court of Australia Act* to

assist the court in the overriding purpose. If they ignore this purpose, they may be penalized severely

GLOBALISATION

- International elements/globalization also has influence on what is an appropriate process – with international disputes raising many issues in relation to speed/minimal cost, access to the legal system, enforceability of resolution
- Many parties now address the many concerns with international disputes pre-emptively in a contract.

TECHNOLOGY

- Technology has made expert evidence even further out of reach of judges and lawyers – with a greater reliance needed, particularly in areas like science.
- The greatest ramification of greater reliance on expert evidence is the need to ensure that the evidence meets the standard of admissibility and is managed in a cost-effective manner
- Technology has greatly assisted the court in a number of capacities (video conferencing etc.), but the court has also approached it cautiously to maintain the features of a court, such as the right to be heard and open justice
- Technology also results in more and more documents used in disputes, with a rise in information equating with greater costs and delays as information must be collected and reviewed for relevance and privilege to satisfy discovery or subpoena obligations.