

PROCESS, OPEN JUSTICE & FAIRNESS IN THE ADVERSARIAL SYSTEM

Procedural Law

Function: Produce civil order, resolve disputes and create order for specific purpose. Liberties of individuals protected by procedural standards. Procedural law (process a case goes through) provides mechanism by which substantive law (how facts of case handled) is enforced.

Four Elements of Fairness: *Voice* (participation in case), *Neutrality* (consistency of law, unbiased judges & transparency), *Respect & Trust*.

Adversarial: Parties present evidence & arguments, court decisions set precedent and judge's role reactive (reacts to evidence). Oral evidence is given via cross-examination.

Inquisitorial: Codified law (contains all needed information), no separation between trial & pre-trial and no cross-examination or physical hearing. Judges are proactive & reactive.

Civil: Burden of proof on D on BoP, aims to restore damages, private litigants, enforcement by citizens or government & equal power balance in terms of resources (not always – workers v James Hardy).

Criminal: Burden on P beyond reasonable doubt, aims to deter & punish, state versus offender, prosecution/criminal record/sentence and unequal power balance (state versus individual).

Themes of Civil Procedure

Open Justice: Provides accountability & legitimacy – justice must be seen to be done. Court may depart for children's court, informants/whistle blowers or national security. Superior courts = inherent powers, use precedent for legislative gaps. Lower courts = statute courts and only implied power.

Witness V Marsden: Inmate wanted anonymity in defamation testimony. Closed court not granted by orders to prevent pictures, reporting etc.

Hogan v Hinch (2011): Application of open justice limited in superior court's inherent jurisdiction/ inferior court's implied powers where necessary to secure proper justice. Where "exceptional and compelling considerations going to national security" require confidentiality, departure from open justice justified.

Section 71 Civil Procedure Act 2005: Proceedings may be closed to public in following circumstances – (a) Hearing of interlocutory application except while witness giving evidence, (b) if presence of public defeats ends of justice, (c) if business concerns guardianship, custody or maintenance of a minor, (d) proceedings not before jury and formal or non-contentious, (e) business does not involve appearance of any person, (f) if equity division of Supreme Court sees fit or (g) if uniform rules so provide.

Fair Trial: Opportunity to be heard, fair notice & standards of proof.

Stead v SGIC: Trial judge told P's council not to address evidence given by D. Trial judge made decision based on unaddressed evidence. Showed possibility of winning case, retrial ordered on appeal.

Mastronardi v NSW: Sued state for negligence in not providing protection in jail. M alleged miscarriage of justice as part of evidence misapprehended and other part not relied upon.

Other Themes: Access to justice and role of judicial discretion.

Problems with Civil Procedure: Cost, delay, lack of access (due to cost/delay), uncertainty, unfairness & excessive complexity.

Court Systems: State System (SC/CoA > District > Local), Federal System (HCA > Federal/Family Court) & Tribunals (industrial relations commission, worker's compensation commission etc.)

Case Management

Speedy disposition versus maintenance of justice - quick resolution usually just anyway.

AON Risk Services v ANU: ANU applied for adjournment to make substantial changes toward end of proceedings. Court ruled ANU had ample chance to do it earlier, explanation for changes was inadequate (said it was tactical move) and request to amend statement of claim not allowed.

QLD v J.L. Holdings: Achieving justice took precedence over cost & delay, ruled nothing can stop party requesting change. Dissenting judge 'deplorable it took 10 months to decide on adjournment'. Historical case of how litigation should not be handled – is this anomaly or current state?

ERA v Armstrong: Inadvertent disclosure of discovery documents by paralegal. A denied request for return and claimed waive by disclosure. ERA sought injunction. Return order without injunction.

Section 56 CPA 2005: Overriding Purpose – (1) To facilitate just, quick and cheap resolution of the real issues (2) Court must seek to give effect to overriding purpose when it exercises power (3) party to proceedings under duty to assist court to further overriding purpose and to comply with court directions (4) Each of the following must not by their conduct cause a party to breach their duty identified in s (3): (a) solicitor/barrister (b) any person with relevant interest (5) Court may account failure to comply in exercising discretion with respect to costs

Section 57 CPA 2005: (1) Proceedings in court are to consider the following objects (a) just determination (b) efficient disposal of business of court (c) efficient use of judicial/admin resources (d) timely disposal of proceedings at affordable cost to parties.

Section 58 CPA 2005: Court to follow dictates of justice – (1) In deciding: (a) whether to make order for management of proceedings: (i) amendment of document (ii) granting adjournment or stay of proceedings, and (iii) any other order of procedural nature. (b) Terms in which any such order is to be made, court must seek to act with dictates of justice. (2) For purpose of determining what are dictates of justice, court (a) must regard provisions of s56 & s57, and (b) regard the following matter to extent they are relevant (i) difficulty/complexity of issues (ii) expedition of parties including how timely they've been (iii) lack of expedition beyond control of parties (iv) degree parties have fulfilled their sole under s 56(3)...

Section 59 CPA 2005: Elimination of delay – Courts object should be implemented to eliminate lapse of time between commencement and resolution beyond that reasonably required for interlocutory activities necessary for fair & just determination of issues in dispute.

ALTERNATE DISPUTE RESOLUTION, COSTS & ETHICS

ADR

Types of ADR: *Negotiation* (no third party with facilitative, advisory or determinative role – positional approach [adversarial fighting for limited resources] or interest based approach [collaborative, identifies interest & expands pie]), *Mediation* (facilitated negotiations to reach agreement using neutral 3rd party), *Arbitration* (parties present evidence to arbitrator/dispute resolution practitioner, makes decision) & *Conciliation* (used in civil law, conciliator drives negotiations to conclusion).

