

PROCEDURAL LAW

CPA s 56 (1)

- The overriding purpose of this Act and the rules of the court, in their application to civil proceedings, is to facilitate the just, quick, and cheap resolution of the real issues in the proceedings

FAIR TRIAL

- Elementary right of every accused person to fair and impartial trial
- Duty on courts to prevent abuse of process – maintain public confidence
 - Conflict between right to fair hearing + procedural equality

Tension between efficiency + justice

- Dispute between parties
- Procedural justice v substantive justice
 - Best procedure is fastest + cheapest; risks substantive injustice
 - Closest thing to ‘right answer’/substantive may be procedurally unfair
 - If process takes too long, it is also substantively unjust – dead witnesses, parties giving up
- Lawyers’ conflicts of interest
 - Procedural efficiency is possibly not in interest of lawyers
 - *Legal Profession Act 2004 (NSW) – s 347*
 - Legal practitioner must not make claim unless there exists reasonable prospects for success
 - Ethical requirements – *Legal Profession Uniform Law Australian Solicitor’s Conduct Rules 2015* (p. 119)

State as Model Litigant

- *NSW Model Litigant Policy for Civil Litigation – p. 58*
 - Strong focus on obligation on state to act more than merely honestly
 - ‘complete propriety, fairly and in accordance w/ highest prof. standards’
 - i.e not causing delays, taking advantage of claimants w/out resources etc.
 - does not prohibit state from exercising same rights (e.g. costs orders)

OPEN JUSTICE

- Conducting justice in public
 - *R v Sussex Justices; Ex Parte McCarthy* – “justice must not only be done but seen to be done”
- Can be closed
 - E.g.
 - Witness giving evidence via CCT
 - Prohibit publication of part/whole proceeding
 - Close court to public

LAWS1014 – CIVIL EXAM NOTES

- Power to make orders to “close” justice can be subject of specific legislation
 - CPA s 71 - permits judge to close court
 - *Court Suppression and Non-Publication Orders Act 2010* – making of suppression + non-publication orders due to court’s inherent/implied jurisdiction

COURTS

Supreme Court of NSW

- All matters not within excl. jurisdiction of federal courts
- Unlimited civil jurisdiction; most serious criminal cases
- Common Law System
 - +\$750 000
 - criminal + administrative law matters
- Equity Division
 - Commercial law, corporations law, equity, trusts, probates, family provisions legislation
- Appellate divisions
 - Court of Appeal
 - Court of Criminal Appeal

District Court of NSW

- Civil jurisdiction - \$750 000
- Unlimited jurisdiction in claims for damages for personal injuries arising out of motor vehicle accidents or motor accidents

ADVERSARIAL V INQUISITORIAL

Adversarial	Inquisitorial
Trials lengthy; involve extensive evidence	No rigid separation between pre-trial & trial → cases usually shorter
Umpire judge – reactive + impartial role	Proactive + inquisitive judge; less participatory system for parties
Parties bear costs	Large proportion falls on the state
Reliance on oral argument + cross-examination	Emphasis on documentary proof
Inherent + separate power of judiciary to adjudicate	Any officers of state – not exclusive to judiciary

Lord Woolf, ‘Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales’ + ‘Final Report...’

- Primary issue – adversarial culture restricts access to justice
- Recommended Reforms
 - Early settlement of disputes

LAWS1014 – CIVIL EXAM NOTES

- Greater use of ADR
- Single expert witnesses
- Encouraging cooperation amongst lawyers
- Identification + reduction of issues as basis for case preparation
- Moving to trial ASAP if settlement is not possible
- Use of overriding principles in court rules
- Has led to:
 - other reviews – ALRC ‘Review of the Adversarial System of Litigation’ 1999
 - greater use of case management + ADR

CASE MANAGEMENT

- Judges managing cases in order to increase efficiency + give effect to the overriding purpose
 - Importance of reducing delay
 - ‘blitz’ to clear backlog
 - increase in jurisdiction of lower courts
 - *Bi v Mourad* – Allsop P – CPA intends to eliminate delay
- judges have power to give directions to fulfil duty – directions hearing
 - CPA div 2 Part 6 – ss 61-63
 - UCPR – rr. 2.1, 2.3
- The dictates of justice must balance the need to keep proportionate costs + eliminate delay
 - *Dennis v Australian Broadcasting Corp* – all 3 must be considered
- Each court has its own system for case management – set out in Practice Notes
 - E.g. District Court’s No. 1: Case Management in the General List
 - Court aims to have cases completed within 12mth of commencement
 - P must not commence proceedings until they are prepared to proceed
 - Supreme Court has: General Case Management, Professional Negligence, Possession, Defamation, Administrative Law, Criminal Law Lists
- *AON Risk Services Australia v ANU*
 - Process of justice needs to be overlaid w/ consideration of delay + costs
 - Need to consider litigants in line – allowing party to take too long means court cannot assess others
 - No right to indulgence – e.g. amendments of pleadings/adjournments
 - Costs order not always sufficient to overcome injustice party seeking indulgence
 - Not all indulgences must be refused – courts have to weigh justice of the situation
- Effect of *AON Risk Services*
 - Crack down on delay + costs – focus on efficiency, not right to be heard
 - Cited in over 900 cases
 - *NAB v McCann* – failure to overturn default judgement
 - *Richard v Cornford (No 2)* – 2nd D denied right to late cross appeal

LAWS1014 – CIVIL EXAM NOTES

- *Bank of Western Australia v Campbell* – default judgement set aside but only for 2nd D + limited defence
- *Queensland v JL Holdings Pty Ltd* (1997)
 - Considered the paramount balance of case management principles against the importance of individual justice
- SOURCES:
 - CPA
 - ss 56 – 60

ADR

- *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015* – r 7.2
 - Practitioner must inform the client about alternatives which are reasonably available
 - Unless practitioner believes on reasonable grounds that client already understands alternatives as to permit client to make decisions about their best interests
- *Legal Profession Uniform Conduct (Barristers) Rules 2015* – r 36
 - Similar
- Victorian Law Reform Commission, 'Civil Justice Review' Rpt 14 (2008)
 - Various benefits + disadvantages
- Michael Moffitt, 'Three Things to be Against (Settlement Not Included)'
 - Settlement + litigation are heavily intertwined
- Adjudication – parties present arguments + evidence to dispute resolution practitioner who makes determination which is enforceable by authority of adjudicator
- Arbitration – parties present arguments + evidence to dispute resolution practitioner who makes determination; CPA s 36-39, 42
- Case appraisal – dispute resolution practitioner investigates dispute + provides advice on possible desirable outcomes + means whereby these may be achieved
- Case presentation; mini-trial - parties present arguments + evidence to dispute resolution practitioner who provides advice on facts of dispute + possible, desirable outcomes + means to achieve this
- Conciliation - parties w/ assistance of conciliator (advisory, not determinative role):
 - identify issues in dispute
 - develop options
 - consider alternatives
 - endeavour to reach agreement
- Early neutral evaluation – parties present arguments + evidence at an early stage , w/out determining facts of dispute
- Expert appraisal – where dispute resolution practitioner chosen on basis of their expert knowledge investigates dispute → provides advice + possible outcomes + means
- Expert determination – parties present arguments + evidence to dispute resolution practitioner chosen on basis of their expert knowledge who makes determination