

LAWS1014 – Notes

CIVIL	vs	CRIMINAL
Individual vs Individual (corps) vs (corps)	Parties	The State vs Individual
Private interest	Interests	Public interest
Damages / Relief → Form of compensation	Result / Consequences	Punishment → imprisonment, fine
Balance of Probabilities (lower standard of proof)	Burden & Standard of Proof	Beyond Reasonable Doubt (higher standard of proof → since involves the State and individual & severe punishment)

INQUISITORIAL SYSTEM	vs	ADVERSARIAL SYSTEM
Civil law system		Common law system
Judge controls the dispute		Parties control the dispute → parties define the dispute, decide what evidence/arguments to give to the court, decide which witness to call in...
Codified law, rather than judge-made laws → no binding precedent		Court decisions form precedent, and are legally binding on lower courts
Cases much shorter		Trials are quite lengthy, extensive evidence
Judge is inquisitive and proactive → judge will ask questions to draw out evidence on issues		Judge plays an impartial role as an umpire → reactive; listen to evidence, make decisions based on rules of law → but cannot raise new issues or cross-examine witnesses
Documented proof and evidence → no cross-examination, and no physical hearing → decision made on the paper		Oral argument, oral evidence → cross-examination
No rigid separation between pre-trial and trial phases		Distinct separation between pre-trial and trial phases
<u>Note</u> : this is very idealised way of differentiating between Inquisitorial and adversarial system → most systems are a hybrid mix of the systems (Page 12 – The Trial)		

Part 1: Criminal Procedure

Topic 1: Introduction to Criminal Procedure

Part 1: The Criminal process, its underlying principles and its importance

In practice, the criminal procedural law (criminal procedure) controls the balance between state power and the rights of the individual.

Procedural Law

- Procedural law draws from various/multiple sources of law (e.g. subordinate legislative instruments, court rules) to comprise a set of rules by which a court hears and determines how and when substantive matters may be put before a court

- S46 Jurisdiction of courts

- (1) The Supreme Court has jurisdiction in respect of all indictable offences.
- (2) The District Court has jurisdiction in respect of all indictable offences, other than such offences as may be prescribed by the regulations for the purposes of this section

Strictly Summary: Local Court

- Some offences are to be dealt with summarily (*CPA s6*) → Summary offences

6 Certain offences to be dealt with summarily

- (1) The following offences must be dealt with summarily –
 - (a) an offence that under this or any other Act is required to be dealt with summarily,
 - (b) an offence that under this or any other Act is described as a summary offence,
 - (c) an offence for which the max penalty that may be imposed is not, and does not include, imprisonment for more than 2 years, excluding the following offences
 - (ii) an offence that under any other Act is required or permitted to be dealt with on indictment,
 - (iii) an offence listed in Table 1 or 2 to Schedule 1.
- (2) An offence may be dealt with summarily if it is an offence that under this or any other Act is permitted to be dealt with summarily or on indictment

- Offences to be dealt with summarily:

- Those required to be dealt summarily by the CPA or other Act, unless election made to have the matter dealt with on indictment.
- Offences labelled as summary offences
- Offences punishable by a maximum penalty up to 2 years (unless it is an offence required to be dealt with on indictment; and an offence listed in CPA Schedule 1, Tables 1 or 2)
- Offences permitted/required to be dealt with summarily are to be dealt with by Local Court (*CPA s7*)
- Maximum Penalty
 - a maximum penalty up to two years (unless it is an offence required or permitted to be dealt with on indictment; and an offence listed in CPA Schedule 1, Tables 1 or 2)

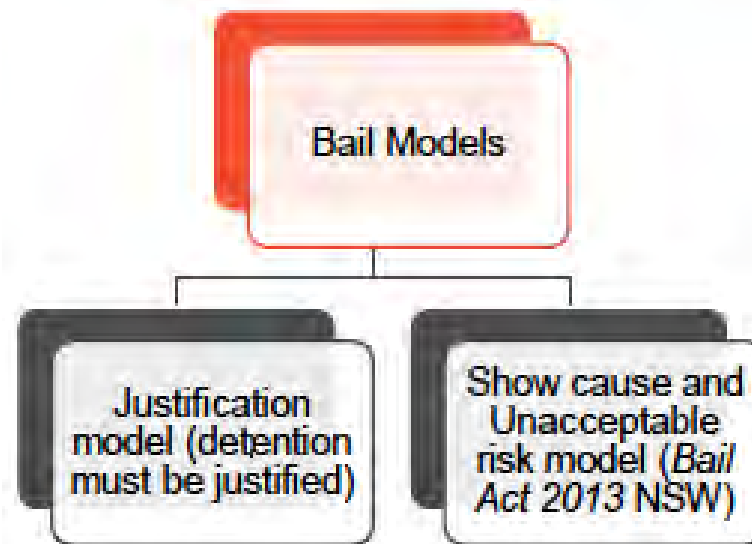
Elective or 'hybrid' offences → downward classification

- Hybrid offences are offences that can be dealt with either summarily or indictment → they are taken to be indictable offences that must be dealt with summarily
- *S 260 of CPA* – sets up the Table 1 and Table 2 mechanism of election → offences to be dealt with summarily **unless election made to proceed on indictment**
- They “define deviance down” (*Garland*) by shifting indictable offences into summary jurisdiction
 - *S 260 (1)* → Table 1 offences (more serious elective offences) – **both P and D** have the power to elect to proceed on indictment (i.e., to proceed in higher court)
 - More serious elective offences
 - D won't elect for trial on indictment → because exposure to the maximum sentencing
 - D might elect to proceed to trial on indictment → as D wants to be tried by jury → D may have grounds to believe that they can convince the jury of acquittal where a magistrate would not
 - What factors might influence P in deciding whether or not to elect for a trial on indictment? → P wants to expose the accused to the max sentence for the interests of the community
 - *S 260 (2)* → Table 2 offences (less serious elective offences) – **only P** has power of election
- Downward classification of indictable offences to 'hybrid' / 'either way' offences set out in *Criminal Procedure Act 1986 (NSW) Schedule 1: Tables 1 & 2*
- Maximum Penalty
 - Significant reduction in penalty when proceed summarily. If tried on indictment:
 - Sexual touching – child under 10 (*s 66DA*)
 - Up to 16 years of imprisonment
 - reckless GBH or wounding (*Crimes Act s 35*)

- Bail Act 2013 also introduced as Government was concerned about so many people on remand → so why is there an increase in remand after 2013?
 - Increase in police enforcement of bail conditions leading to bail revocation
 - Increase in policing: more arrests and charges laid by police likely to result in refusal
 - Increase demand in court = growth in court delay has meant longer periods on remand

Bail Law Reform in NSW

- History of Bail Law Reform in NSW
 - In June 2011, NSW Government announced that the NSW Law Reform Commission (NSWLRC) would undertake a fundamental review of the Bail Act 1978
 - In April 2012, the NSWLRC released their report (**Bail**, Report No 133)
 - Report found that there were many amendments of the 1978 Act which made it hard to comprehend
 - Report recommended a “justification approach” → but police rejected this model → Government adopted “Unacceptable risk approach” → “Show cause” approach introduced in 2015 amendments
 - Introduction of risk management model was a big shift from common law principles of “presumption of innocence” and “right to be at liberty”
 - ‘...a giant step away from the fundamental principles underpinning Western values on bail.’
(Max Taylor, retired magistrate, ‘Bail out’ 19/5/2013 *Justinian*)
- **Tensions – Justification vs Unacceptable risk**
 - Justification model: a person is entitled to be at bail, unless the bail authority is satisfied (after making necessary considerations) that refusal is justified
 - Unacceptable risk model: bail should be granted, but refused if there is an unacceptable risk (e.g. that a person will fail to appear in court, serious offence, endanger witnesses, destroy evidence...)
- **Bail Models**
 - Which model is most strongly aligned with a presumption in favour of bail?



- **Continued amendments to the Bail Act 2013**
 - Major amendments include:
 - Bail Act 2013 commenced 20 May 2014
 - “Show cause” provision commenced 28 January 2015
 - Further amendments in 2016: made primarily in response to the Martin Place Siege commenced 6 December 2016.
 - These amendments included provision that for specified offences (set out in **s16B**), bail must be refused unless the accused person shows cause why his or her detention is not justified: **s16A**.

- Area 3: Agreement to put some charges on Form 1
 - Negotiation over whether charged matters be included to be taken into account for sentencing on Form 1 [NOT EXAMINABLE]
 - Where accused is charged of more than one offence – they plead guilty to one, but not the others → the others may be included in a Form 1
 - Offences on a Form 1 are all taken into account when sentencing for the main offence and that the maximum penalty available is the maximum of the particular main offence.
 - If there are multiple offences relating to the one episode, it will be appropriate to place preparatory or lesser offences on the Form 1 → eg. indecent assault leading to sexual intercourse without consent; robbery of customers within a bank during a bank robbery (unless there are aggravating factors such as actual bodily harm caused to the customer).

Incentives for Pleading Guilty – How much sentence discounts should be given for a guilty plea?

What are the inducements to plead guilty?

- 1) Plea of guilty to a lesser charge (as part of charge negotiation) = lesser maximum penalty that may be imposed
- 2) Practical benefits – reduction in anxiety before trial, avoid shame or publicity of trial, uncertainty about result of trial, saves defendant money in finding legal representation for trial, guilty plea demonstrates defendant's remorse, guilt and rehabilitation, may provide more opportunities for bail
- 3) Sentencing discounts for guilty pleas (see **S22 and s25D of Crimes (Sentencing Procedure) Act**)

Offences not dealt with on indictment

S22 of Crimes (Sentencing Procedure) Act 1999 (NSW) – Guilty plea to be taken into account for offences not dealt with on indictment

(1) *A court passing sentence on an offender who has pleaded guilty must take into account:*

- (a) The fact that the offender has pleaded guilty, and
 - (b) When the offender pleaded guilty or indicated an intention to plead guilty, and
 - (c) The circumstances in which the offender indicated an intention to plead guilty
- *and may impose a lesser penalty than otherwise would have been imposed*

(1A) Lesser penalty must not be unreasonably disproportionate to the nature and circumstances of offence

- (5) Only applies to offences dealt with summarily or a sentence for an offence dealt with on indictment, but is not under Division 1A

Offences dealt with on indictment

S25D of Crimes (Sentencing Procedure) Act – Sentencing discounts for guilty plea for offences dealt with on indictment (replace the utilitarian value mentioned in *R v Thomson*)

- (1) the court **is** to apply a sentencing discount for the utilitarian value of a guilty plea
- (2) **Amounts of sentencing discounts** – the discount for a guilty plea (except **s(3)** or **(5)** or **s25E**)
 - (a) **Reduce 25%** in any sentence if the plea was accepted **by the Magistrate in committal proceedings**
 - (b) **Reduce 10%** if the offender was committed for trial and the offender
 - (i) pleaded guilty at least 14 days before the first day of the trial, or
 - (ii) complied with pre-trial notice requirements + pleaded guilty at the first available opportunity
 - (c) **Reduce 5%** in any sentence if (a) and (b) does not apply
- (3) **Discount variations – new count offences** the discount for a guilty plea of a new count offence
- (5) Discount variations – person found fit to be tried after committal for trial
- (6) Opportunities for legal help to be taken into account for s(3) and s(5)

R v Thomson (2000) 49 NSWLR 383 → guidelines preceded **s25D of Crimes (Sentencing Procedure) Act**

- **Spigelman CJ** – set out guidelines for guilty plea discount at [160]:
 - (iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of **10–25 per cent discount** on sentence. The primary consideration determining where in the range a particular case should fall, is the **timing of the plea**. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

- The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (NSW)* was passed on 24/10/18 and commenced in May 2018.
- It abolished suspended sentences (s12 CSPA), Community Service Orders (s8 CSPA), Good Behaviour Bonds (s9 CSPA).
- It also makes some consequential minor amendments to s10 (CSPA) to enable the imposition of a **Conditional Release Order**.
- The Act abolishes the separate penalty of home detention, but home detention may be imposed as a condition of an **Intensive Correction Order (ICO)**.
- It set up a system of **Community Correction Order (CCO)**
- Notice the change in terminology for non-custodial sentences to 'non-custodial alternatives' → criticised in Brown textbook since they are not alternatives to imprisonment, but are separate punishments themselves
- **Intensive Correction Orders = Supervised release on custodial sentences:**
 - **S 7 Intensive Correction Order (ICO) – (CSPA)**
 - 1) A court that has sentenced an offender to imprisonment may make an intensive correction order ... to be served by way of intensive correction in the community → it is a form of supervised release
 - 2) the court is not to set a non-parole period for the sentence
 - 3) does not apply to an offender under 18
 - 4) subject to Part 5 → An ICO can only be ordered where the sentence of imprisonment imposed does not exceed 2 years for a single offence (s68(1)), or 3 years for multiple offences (s 68(2)).
 - ICOs cannot be made for certain offences → murder/manslaughter
 - When considering the imposition of an ICO community safety is the paramount consideration: s 66.
 - **Standard conditions: s 73:**
 - Offender must not commit any offence: **s 73(2)(a)**
 - Offender must submit to supervision by a community corrections officer.
 - **Additional conditions (s 73A) include:**
 - Home detention
 - Electronic monitoring
 - Curfew
 - Community Service Work
 - Rehabilitation
 - Refrain from consuming alcohol or illicit drugs
 - Typically for those with mental illness, drug dependency problem
- **Community Correction Order (CCO) → less serious than ICO**
 - **Community Correction Order (CCO): s 8 CSPA**
 - A community correction order may be imposed instead of imprisonment.
 - Can be a form of supervised release or unsupervised order depending on the conditions imposed.
 - Maximum term = 3 years: **s 85(2)**
 - The same standard conditions as for ICOs apply: **s88** (s73 for ICOs)
 - Additional conditions are similar as those for an ICO **except:**
 - Home detention is precluded: **s 89(3)(a)**
 - Electronic monitoring is precluded
 - Any curfew must not exceed 12 hours in 24
- **Conditional release orders (CRO)**
 - **Conditional Release Order (CRO): s 9 CSPA**
 - Instead of a term of imprisonment or a fine a court may impose a CRO.
 - Form of unsupervised order → least serious, like a good behaviour bonds.
 - Maximum term = 2 years.

- (j) the service and filing of affidavits, witness statements or other documents to be relied on,
- (k) the giving of evidence at any hearing . . .
- (l) **the use of telephone or video conference facilities . . . and other technology,**
- (m) the provision of evidence in support of an application for an adjournment or amendment,
- (n) a timetable with respect to any matters to be dealt with . . .
- (o) the filing of written submissions

Practical Effect of CPA and UCPR

- Courts are required to give effect to the overriding purpose of **CPA s 56**

Judge's role in case management

- Judge controls the case by making directions and setting timetables
- Role can be performed by registrar or list judge depending on the court, list and complexity of individual case
- Tensions arise when priorities between case management objectives and issues of justice come into conflict
 - See **Queensland v JL Holdings Pty Ltd (1997) CLR 146** → "Justice is the paramount consideration in determining an application such as [Queensland's seeking leave to amend pleadings]. Case management . . . should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties."
 - In **AON Risk Services v ANU (2009) 239 CLR 175** the HC placed more emphasis on case management → stated that the limited application of case management in **Queensland v JL Holdings** should not apply → case management offers systemic justice, need to think more about than the individual parties before the court [prevailing]

Key Issue in Civil Procedure

- **BALANCING** → Speedy disposition of cases VS Individualised justice
- **Qld v JL Holdings (1997) 189 CLR 146**
 - **Facts:** in a dispute, the trial judge refused an application to amend pleadings by the defendant on the basis that it should have been done years ago (ie, delay).
 - **Held:** though case management is endorsed, individual justice is the dominant criterion and take priority over case management. **Worldwide Corporation** → did not pay sufficient regard to the fact that the courts are concerned **to do justice to all litigants**
 - Since JL Holdings, the CPA was passed and in particular Part 6, which deals with the overriding purpose.
- **AON v ANU (2009) 239 CLR 175** → cite this case for case management
 - **Facts:**
 - ANU commenced proceedings against three insurers, Aon was its insurance broker. They were already entering consent order. On the third day of a 4-week trial of the action, ANU sought an adjournment to amend Statement of Claims and to add a new claim against Aon.
 - The trial judge awarded the adjournment, Aon appealed to HC.
 - **Held:**
 - **French CJ:** found that the amendments were seeking to introduce new and substantial claims, such that AON would be required to defend the case anew → thus, did not allow an amendment, since it was too late
 - HCA stated that "In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone."
 - Speed and efficiency are essential to a just resolution of proceedings.
 - There is no right to an indulgence, a cost order is not always sufficient to overcome the injustice of a party seeking an indulgence.

(ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, **the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.'**

- Found the freezing order was narrow enough since it was only made on the dividends → which traced back to Eagle Homes (which would be recoverable by plaintiff)

Part 5: Originating process and introduction to service

Commencing Proceedings

- How to commence a civil case/claim?
 - file originating process
- What sort of document is required?
 - statement of claim, summons, commercial list statement (depends on court/list)
- Are fees payable?
 - usually yes
- How to notify the other side that a lawsuit has begun?
 - service of originating process
- **How to commence proceedings?**
 - File an originating process with the court
 - summons or statement of claim
 - valid for service
 - 6 months after the date on which it is filed in the Supreme Court /Local Court
 - 1month in the District Court
 - Judge has discretion to extended time limit
 - Effectuate personal service on Defendant
 - person serving completes affidavit of service: **UCPR r35.8**

Originating process

- 'Originating process means the process by which proceedings are commenced, and includes the process by which a cross-claim is made' – **s3 CPA**
 - In NSW proceedings are commenced by either a summons or a statement of claim
- **Statement of Claim (UCPR r 6.3):**
 - Used when the proceedings involve disputed contentions of fact – **UCPR r 6.3**
 - Used for tort, debt, property
 - **Statement of Claim – contents**
 - Court
 - Parties – names, addresses, contact details
 - Type of claim, e.g., torts, negligence, public liability
 - Relief claimed, e.g., damages, interest, costs
 - Pleadings and particulars
 - Signature of legal representative
 - Notice to Defendant
 - How to respond
 - Address of Registry of Court

"NOTICE TO DEFENDANT"

If you do not file a defence within 28 days of being served with this statement of claim:

You will be in default in these proceedings.

The court may enter judgment against you without any further notice to you. ..."

"HOW TO RESPOND"

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible. ...

You can respond in one of the following ways:

1 If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.

2 If money is claimed, and you believe you owe the money claimed, by:

Paying the plaintiff all of the money and interest claimed. ...

Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

Paying the plaintiff that part of the money that is claimed.

Filing a defence in relation to the part that you do not believe is owed."

Continuing obligation to give discovery

- **UCPR r21.6**

- Part 1 documents in party B's possession which become known after discovery has been made are to be made available to Party A
- This includes privileged documents which have ceased to be privileged

Non-disclosure of discovered documents

- **UCPR r21.7**

- No copy or information from a document obtained as a result of discovery is to be disclosed, or used otherwise than for the conduct of the proceedings,
 - Except by leave of the court
 - Unless the document has been received into evidence in open court

Discovery rules in practice

1. Are the circumstances exceptional? (**Practice Note SC Eq 11** – p. 662)
 2. Is disclosure “necessary” for the resolution of the real issues in dispute?
 3. What are “special reasons” in personal injury cases? **UCPR r21.8**
- See:
 - ***Percy v General Motors Holden Pty Ltd* [1975] 1 NSWLR 289**
 - **Facts:** Percy was injured in a motor vehicle accident → he sued the manufacturer for damages for negligence in manufacturing the car → he sought an order for discovery of documents
 - This was a personal injury case → so plaintiff needed ‘special reasons’ to request discovery (**UCPR r21.8**)
 - **Held:** discovery will be ordered since it is in the interest of justice and for the interest of a fair trial
 - The ‘interest of justice and fair trial’ is a ‘special reason’ for allowing discovery
 - ***In the Matter of Mempoll, Anakin and Gold Kings* (KLVM p. 667)**
 - [12]: If notice to produce is served with the object of avoiding the operation of the practice note, the court is able to set aside a notice to produce in an appropriate case if it appears to involve the subversion of the operation of the practice note.
 - Disclosure before both parties have disclosed their evidence is granted in “exceptional circumstances” per 4 of the practice note
 - *Leighton International v Hodges*: “exceptional circumstances” is where something is out of the ordinary or unusual. Doesn't need to be unique. “exceptional” in the sense that it necessitates disclosure not “exceptional” at large. Only allowed where disclosure is shown to be reasonably necessary to disposing of the matter fairly or in the interests of a fair trial.
 - “Exceptional Circumstances” may arise where highly relevant information is solely or largely in the possession of one party.
 - *Kelly*: An appraisal of all the circumstances and the context in which the expression of “exceptional circumstances” must be satisfied.
 - ***Graphite Energy v Lloyd Energy Systems* (KLVM p. 670)**
 - Practice note does not require that ALL evidence is to be served since the key purpose of discovery is for a party to obtain documents which it can tender.
 - Practice note SC Eq 11(5) → Requires that discovery will only be ordered where necessary
 - It must be reasonably necessary for having discovery:
 - Means “not essential but reasonably required for the fair disposition of the matter”
 - Touchstone for discovery is relevance to a fact in issue in the proceedings. **UCPR 21.2** → It must always be possible to show a connection between the class of documents being requested in discovery and a fact in issue, and where a class is specified in some other manner than by relevance to a fact in issue it must be apparent that the class so described will capture only documents that are relevant to a fact in issue.
 - ***Priest v NSW* (KLVM p. 674)**
 - **Facts:** special reasons for discovery → related to whistleblowing case → at the heart of the plaintiff's claim was the misconduct of senior officials of NSW police in allegedly victimising the

Disclosure of offer to court or arbitrator → UCPR r 20.30

- (1) No statement of the fact that an offer has been made may be contained in any pleading or affidavit.
- (2) If an offer is not accepted, no communication with respect to the offer may be made to the court at the trial or, as the case may require, to the arbitrator.
- (3) Despite subrule (2), an offer may be
 - (a) if a notice of offer provides that the offer is not made without prejudice, or
 - (b) to the extent necessary to enable the offer to be taken into account for the purpose of determining an amount of interest up to judgment, or
 - (c) after all questions of liability and relief have been determined, to the extent necessary to determine questions as to costs, or
 - (d) to the extent necessary to enable the offer to be taken into account for the purposes of **section 73(4) of the Motor Accidents Act 1988**, **section 137(4) of the Motor Accidents Compensation Act 1999** or **section 151M of the Workers Compensation Act 1987**.

Where offer accepted and no provision for costs → UCPR r 42.13A

- (1) This rule applies if the offer:
 - (a) is accepted by the offeree, and
 - (b) does not make provision for costs in respect of the claim.
- (2) If the offer proposed a judgment in favour of the plaintiff in respect of the claim, the plaintiff is entitled to an order against the defendant for the plaintiff's costs in respect of the claim, assessed on the ordinary basis up to the time when the offer was made.
- (3) If the offer proposed a judgment in favour of the defendant in respect of the claim (including a dismissal of a summons or a statement of claim), the defendant is entitled to an order against the plaintiff for the defendant's costs in respect of the claim, assessed on the ordinary basis up to the time when the offer was made.

UCPR Part 42: cost consequences