Introduction: Adversarial System of Civil Litigation, Open Justice and Fair Trial - Summary

What is Civil Procedure and Why Is It Important?

- Definition of civil procedure
  - The body of law governing the process of litigation undertaken by private parties, mostly individuals or corporations (but also governmental parties)
  - From Mason CJ in McKay v R W Miller & Co (SA) Pty Ltd (1991), “rules which are directed to governing or regulating the mode or conduct of court proceedings”

- Purpose of civil procedure
  - Ultimate goal of civil procedure - resolution of disputes between private parties (both with and without court)
  - Application of facts to procedural rules in order to attain substantive justice
  - Reductions in costs and delay

- Main sources of procedural law in statutes
  - Civil Procedure Act 2005 (NSW) (CPA)
  - Uniform Civil Procedural Rules 2005 (NSW) (UCPR)
  - Each court has an act that sets up the court and allows the making of rules for its procedure - such as the Supreme Court Act 1970 (NSW) and the Local Court Act 2007 (NSW)
  - Court practice notes created by judges in accordance with powers granted by the CPA and UCPR

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<td>Individuals bear the majority of costs</td>
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- Important themes in civil procedure- balancing competing objectives
  - Open justice (public interest) and principle of a fair trial
o Substantive justice and need for efficiency (reduction in costs and delay)
o Access to justice and the role of litigation as a public benefit to society
o Judicial discretion in managing cases

• Hazel Genn’s thesis of civil justice as a ‘public good’
o Ability to uphold substantive civil rights
o Demonstration of the effectiveness of the law
o Allowance of judges to perform their function of clarifying, developing and applying the law
o Reinforcement of dominant social and economic values through adjudication-the ‘shadow’ cast by the law

Revision of Court Systems (Civil):

• Hierarchical structure of the New South Wales court system
  o Supreme Court of New South Wales
    ▪ Highest court in New South Wales
    ▪ Unlimited jurisdiction in civil law and deals with the most serious criminal matters
    ▪ Common Law division- deals with civil, criminal and administrative law matters where more than $750 000 is claimed
    ▪ Equity division- deals with commercial law, corporations law, equity, trusts, probate and matters dealing with family provisions
    ▪ Two appellate divisions- the Court of Appeal and the Court of Criminal Appeal
  o District Court of New South Wales
    ▪ ‘Intermediate’ court in New South Wales
    ▪ Jurisdiction in both civil and criminal matters
    ▪ Civil jurisdiction has a limit of $750 000 but larger amounts if both parties agree and unlimited jurisdiction in claims for damages for personal injuries from a motor vehicle accident or a work injury
  o Local Court of New South Wales
    ▪ Small court in New South Wales
    ▪ Jurisdiction in both civil and criminal matters
    ▪ Small Claims Division of up to $10 000 and General Division of between $10 000 and $100 000

• Support from two specialist courts
  o Industrial Court
    ▪ Equivalent status to the New South Wales Supreme Court
    ▪ Jurisdiction in both civil and criminal matters- with both original and appellate jurisdiction
    ▪ Hears serious breaches of the State’s occupational health and safety laws
  o Land and Environment Court
    ▪ Equivalent status to the New South Wales Supreme Court
- Has power to determine environmental, developmental, building and planning disputes

- High Court of Australia
  - Highest court in Australia
  - Has both original and appellate jurisdiction- as vested by the Australian Constitution

**Common Steps in Litigation:**

- Common steps in litigation
  1. Dispute arises
  2. Parties are unable to resolve by negotiation
  3. Letter of demand/threat of litigation is sent
  4. Plaintiff files Statement of Claim in court
  5. Statement of Claim is served on Defendant
  6. Defendant enters appearance
  7. Directions hearing (timetable to trial set)
  8. Defendant requests further particulars
  9. Plaintiff provides further particulars
  10. Defendant files Statement of Defence
  11. Possible further particulars, amended Statement of Claim, amended Defences, Cross-Claims, interlocutory motions on pleadings
  12. Pleadings close
  13. Parties undertake discovery
  14. Parties serve lists of discovered documents
  15. Interlocutory motions regarding discovery and privilege
  16. Third parties subpoenaed for documents (can occur earlier and/or later and can occur several times)
  17. Plaintiff prepares and serves witnesses evidence including expert reports
  18. Defendant prepares and serves witness evidence in reply including expert reports
  19. Plaintiff prepares and serves evidence in reply
  20. Matter set down for trial
  21. Trial preparation (for example, witnesses subpoenaed)
  22. Trial
  23. Judgment
  24. Appeal?

- Noteworthy aspects of the common steps in litigation
  - At any time, parties can negotiate, mediate and/or engage in other alternative dispute resolution activities
  - At some point during the above steps or during the trial, over 90% of cases settle
  - All steps are repeated for cross-claims in parallel to the main proceedings
  - All of this costs a small fortune and there can then be further litigation regarding costs
Open Justice:

• Balancing competing objectives- the public interest in open justice against the right to a fair trial

• Centrality of open justice in the Australian legal system
  o According to Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court of NSW* (2004), “the conduct of proceedings in public...is an essential quality of an Australian court of justice”
  o According to Pembroke J in *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* (2011), the principle of open justice is “indispensable” and “healthy”

• Reasons for the principle of open justice
  o Justifications outlined by Pembroke J in *Seven Network (Operations) Limited & Ors v James Warburton (No 1)* (2011)
    ▪ Enhanced confidence in the integrity of the court system and its administration of justice
    ▪ Increased public accountability
    ▪ Limits on potential abuse and injustice and disincentive to false allegations
  o The provisions of reasons for the decision is an expression of the principle of open justice- outlined in *Wainohu v New South Wales* (2011) involving the classification of the Hells Angels Motorcycle Club as a “declared organisation” which is involved in “serious criminal activity”, because it allows for “public scrutiny”
  o However, limitations of the principle of open justice outlined by French CJ in *Hogan v Hinch* (2011)- “a means to an end, and not an end in itself” so the principle can be ignored “where it is necessary to secure the administration of justice”, in a case where a radio broadcaster, Derryn Hinch, contravened suppression orders made under s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) which constituted an offence

• Powers to depart from the principle of open justice
  o s 71 of the CPA, ‘Business in the absence of the public’- the business of a court may be conducted in the absence of the public if:
    ▪ The presence of the public would defeat the ends of justice (s 71(b))
    ▪ The business concerns the guardianship, custody or maintenance of a minor (s 71(c))
    ▪ If the proceedings are not before a jury and are formal or non-contentious (s 71(d))
    ▪ If the business does not involve the appearance before the court of any person (s 71(e))
  o *Court Suppression and Non-Publication Orders Act 2010* (NSW)
    ▪ Explicitly empowers a court to make a suppression or non-publication order (ss 7-8)
The court “must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice” (s 6)

- Common law powers of exceptions in categories of cases
  - To protect the identity of an informant
  - To protect the identity of victims
  - To protect matters of national security
  - To protect matters of commercial importance

- Methods of ‘closing’ justice
  - Closed court orders- s 71 of the CPA
  - Suppression and non-publication orders- ss 7-8 of the Court Suppression and Non-Publication Orders Act 2010 (NSW)
  - Pseudonym orders- common law powers
  - Orders for anonymous witnesses (use of screens, CCTV and pseudonym orders)- common law powers
  - Confidentiality of documents- common law powers

- Test for justice to be closed
  - Only in exceptional circumstances, when it is “really necessary to secure the proper administration of justice”, according to McHugh JA in John Fairfax & Sons Pty Ltd v Police Tribunal of NSW (1986)
  - Applications for suppression and non-publication orders pursuant to ss 7-8 of the Court Suppression and Non-Publication Orders Act 2010 (NSW)
    - Denied in Einfeld (No 2) (2008)- on grounds “to prevent prejudice to the proper administration of justice”, the defendant sought to prevent publication; however, the court declined to make a non-publication order because the material was already in the public domain and the jury could be appropriately directed
    - Granted in Rinehart v Welker (2011)- on grounds “to prevent prejudice to the proper administration of justice”, the applicants sought a permanent suppression order- because confidentiality was required in the dispute to be determined by private mediation and/or arbitration
  - Applications for closed court order pursuant to s 71(b) of the CPA, as “the presence of the public would defeat the ends of justice”
    - Granted in Re HIIH Insurance Ltd (2007)- case involving liquidation under court supervision, where evidence would hamper the actions of liquidators against debtors
  - Applications for invocations of common law powers by courts
    - Application for pseudonym order granted in Witness v Marsden (2000)- as witness was a gaol inmate so feared for his physical safety if his identity was made public
    - Application for confidentiality of documents granted in Seven Network (Operations) Limited & Ors v James Warburton (No 1) (2011)- due to nature of documents divulging incentive arrangements and
remuneration levels which would facilitate ‘poaching’ and would be likely to harm the commercial viability of the firm

**Fair Trial in the Civil Context:**

- Balancing competing objectives- ‘justice delayed is justice denied’ (procedural justice) against the principle of a fair hearing and procedural equality (substantive justice)

- Procedural justice versus substantive justice
  - The best procedure is the fastest and cheapest but this risks substantive injustice
  - The closest thing to the ‘right answer’ through substantive injustice may be procedurally unfair as it is likely to be expensive and slow

- Fair hearing in civil cases
  - Principle of a fair trial rather than a right to fair trial- as asserted by Spigelman CJ in ‘The Truth can Cost Too Much: The Principle of a Fair Trial’, because there is no right to a fair trial enshrined in the Australian Constitution or in a statute and it is inherently flexible through the discretion of the court
  - A fair hearing involves reasonable notice of the case that has to be met, a reasonable opportunity to present the case and the right of cross-examination
  - A reasonable opportunity to present the case was denied in *Stead v State Government Insurance Commission* (1986)- where the plaintiff’s counsel submitted the trial judge should not accept the evidence of the defendant’s expert witness, who was cut off when the trial judge stated he did not ‘accept’ the evidence; however, in his judgment, the trial judge accepted the evidence of the defendant’s expert witness
  - Key test is whether there is a possibility that there could have been a different outcome- in that case, a new trial was ordered on the basis that the trial judge had deprived the plaintiff of an opportunity to present an argument on a vital issue, so had the plaintiff’s counsel been allowed to continue his submissions, there was indeed the possibility of a different outcome

- Role of lawyers
  - Procedural efficiency is not often in the best interests of lawyers- due to fees charged
  - In large litigations therefore, lawyers have a conflict between the best interests of their clients and the court and their own best interests
  - Professional responsibility- outlined in the *Legal Profession Act 2004* (NSW) and the Law Society of NSW’s *Revised Professional Conduct and Practice Rules 1995*, which states that lawyers “should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with
their clients fairly, free of the influence of any interest which may conflict with a client’s best interest”

**Adversarial System of Litigation:**

- **Features of an adversarial system of litigation**
  - Parties control the dispute- parties define the dispute, present their evidence and argument and bear the costs
  - Trials- lengthy and involve extensive evidence, with emphasis on oral argument and evidence, particularly cross-examination
  - Judge’s role- acts as an umpire so impartial, with a reactive role
  - Impact of judgments- court decisions form the precedent, so binding judgments on future decisions

- **Features of an inquisitorial system of litigation**
  - Trials- no rigid separation between trial and pre-trial phases, along with minimal rules of courtroom practice, strong emphasis on documentary proof, virtually no cross-examination and often no physical hearing
  - Judge’s role- proactive and inquisitive
  - Impact of judgments- codified law, so prior cases are merely persuasive

- **Shortcomings of an adversarial system of litigation**
  - Costs
  - Delay
  - Lack of access to justice (due to costs and delay)
  - Unfairness
  - Uncertainty and excessive complexity

- **Thus, need for reform of the adversarial system of litigation**
  - Greater use of case management
  - Greater use of alternative dispute resolution

- **An adversarial approach to justice colours the dispute resolution alternatives which precede litigation- need to discourage the ‘cards on the table’ approach in the adversarial system of litigation**
The Costs of Litigation and the Introduction of Case Management- Summary

Case Management (Reform of the Adversarial System):

• Definition of case management
  o The role of the courts in managing and directing cases prior to trial, through court-ordered timetables (disciplined through costs orders against solicitors for any breaches)
  o Scope of case management- pleadings and their amendment, discovery, preparation of evidence, length and timing of hearings and summary disposition of cases
  o Case management is provided for by Part 6 of the CPA and Part 2 of the UCPR, the High Court cases of AON v ANU (2009) which overruled Queensland v J L Holdings (1997), judicial discretion and legal practitioner behaviour

• Balancing competing objectives- the quick disposition of cases against substantive justice

• Issues that give rise to the need to reform the adversarial system of litigation through case management
  o Costs- could be employed as a ‘tactical weapon’ to force a party with fewer resources to discontinue proceedings or accept an inferior settlement
  o Delay- ‘justice delayed is justice denied’, with substantial nature of backlogs in the 1970s and 1980s in the District Court and Supreme Court where delays of over five years were common
  o Lack of access to justice and unfairness- due to parties having to discontinue proceedings due to costs and delay
  o Uncertainty and excessive complexity- so aim of CPA and UCPR to produce uniformity

• Case management as defined by the UCPR
  o r 2.1 on ‘Directions and orders’ provides statutory basis for judicial discretion in case management
  o The rule states that “the court may, at any time and from time to time, give such directions and make such orders for the conduct of any proceedings as appear convenient (whether or not inconsistent with these rules or any other rules of court) for the just, quick and cheap disposal of the proceedings”

• Case management as defined by the CPA
  o s 56 ‘Overriding purpose’ holds that the overriding purpose of the Act is to facilitate the “just, quick and cheap resolution” of legal disputes which must be given effect to in the exercise of any power, with costs orders for any behaviour that contravenes the overriding purpose
  o s 57 ‘Objects of case management’ provides the basis of case management:
    ▪ The 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
  o s 58 ‘Court to follow dictates of justice’ provides that the court must follow the “dictates of justice” outlined in ss 56-57 when exercising its judicial discretion in deciding “whether to make any order or direction for the management of proceedings”
  o s 59 ‘Elimination of delay’ provides that delay “beyond that reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties” should be eliminated

• High Court decision in *Queensland v J L Holdings* (1997)
  o This case is evidence that case management was formerly not deemed to be paramount, but individual justice was instead
  o In this case, the defendant sought leave to amend its pleadings; but rejected by the trial judge and the Full Federal Court of Australia according to the principle of ‘justice delayed is justice denied’
  o However, the defendant was successful on appeal in the High Court- as outlined by Dawson, Gaudron and McHugh JJ, case management was deemed to be “an important and useful aid” but 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”

• High Court decision in *AON v ANU* (2009)
  o This case verified the legislation of the CPA and the UCPR so that the court has a role during the preparation of cases in case management
  o In this case, the plaintiff applied for an adjournment and leave to amend its Statement of Claim to add a substantial new claim against the defendant in the third week of a four-week trial; applying *Queensland v J L Holdings* (1997), the trial judge allowed this
  o However, the defendant was successful on appeal in the High Court so *Queensland v J L Holdings* was overruled; as argued by French CJ, leave to amend the plaintiff’s Statement of Claim was denied because “the time of the court is a publicly funded resource”, “undue delay can undermine confidence in the rule of law” and “the waste of public resources and the inefficiency”

• Effect of *AON v ANU* (2009)
  o Evidentiary of the crackdown on costs and delay and has been cited in 943 cases as of 2013
  o Principal goal of civil procedure today- procedural discipline, so that the court reaches a substantially correct outcome by means of proportionate resources and in a reasonable time
  o Managerial judging- role of the judge in the individual case to tailor the civil procedures for the needs of the individual case
o Impact on *NAB v McCann* (2010)- where case management lead to the defence being struck out while the attempt to overturn the default judgment for the plaintiff failed

o Defendant’s viewpoint- Mrs McCann was forced to defend herself to retain her home, pro bono assistance was denied, her lawyers were incompetent and her defences were struck out

o Plaintiff’s viewpoint- for NAB the matter involved a foreclosure on a bad loan secured by mortgage, several defences it opposed were struck out, it defended three applications to set aside the default judgment and experienced a two-year delay in regaining loan funds

o Court’s viewpoint- a futile waste of court time for ultimately the same result

**Costs of Litigation:**

- Role of civil procedure- minimisation of costs of litigation, through case management

- Three major sources of costs of litigation
  - Emotional cost
  - Time cost
  - Financial cost

- Emotional cost of litigation
  - Litigation is stressful for everyone involved
  - As described by Allsop P in *Richards v Cornford (No 3)* (2010), “Ms Richards embarked upon a time-consuming, stressful and potentially very expensive process” which involved uncertainty and concern that it could lead to bankruptcy and financial ruin

- Time cost of litigation
  - Exemplified by *The Bell Group Limited (In liq) v Westpac Banking Corporation No 9* (2008)- where proceedings ran for 13 years before the trial and there were 404 hearing days between 2003 and 2006
  - As noted by Wheeler J in an interlocutory hearing, there were 166 witnesses, over 86 000 pages of documents tendered in evidence and the judgment of Owen J was 2643 pages long

- Financial cost of litigation
  - The financial cost of litigation was exhibited to a farcical degree by *Seven Network Ltd v News Ltd* (2007)- Sackville J criticised the expenditure of $200 million on a single piece of litigation as “not only extraordinarily wasteful, but borders on the scandalous”
  - Costs orders- significant aspect of most civil litigation, costs disputes are usually party-party disputes or solicitor-client disputes, party-party costs generally mean the loser pays (costs in the cause) and a defendant may obtain security for costs to ensure another can pay an adverse order
  - Calculating financial costs through s 98 ‘Courts’ powers as to costs’ of the CPA
    - Costs are in the discretion of the court (s 98(1)(a))
- The court has full power to determine by whom, to whom and to what extent costs are to be paid (s 98(1)(b))
- The court may order that costs are to be awarded on the ordinary basis or on an indemnity basis (s 98(1)(c))
- An order as to costs may be made by the court at any stage of the proceedings or after the conclusion of the proceedings (s 98(3))
  - Calculating financial costs- costs awards are compensatory, generally follow the event (according to UCPR r 42.1), can be calculated on different bases and has a disciplinary element while indemnity costs is an exceptional order
  - ‘Proportionality of costs’ in s 60 of the CPA- costs to the parties are awarded in a way “proportionate to the importance and complexity of the subject-matter in dispute”

**Lawyer’s Ethical Obligations to the Process:**

- **Professional responsibility of lawyers**
  - Requirement to abide by s 56 ‘Overriding purpose’ of the CPA- being the facilitation of the “just, quick and cheap resolution” of legal disputes
  - Outlined in the Legal Profession Act 2004 (NSW) and the Law Society of NSW’s Revised Professional Conduct and Practice Rules 1995, which states that lawyers “should be acutely aware of the fiduciary nature of the relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client’s best interest”

- **Ethical obligations of lawyers**
  - Solicitors- governed by Solicitors’ Rules and the Legal Profession Act 2004 (NSW)
  - Barristers- governed by Bar rules and the Legal Profession Act 2004 (NSW)
  - The duty to the court is paramount

- **Costs awards against lawyers**
  - s 99 ‘Liability of legal practitioner for unnecessary costs’ of the CPA- the court may order that the lawyer bears costs if it appears to the court that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of a legal practitioner (s 99(1)(a))
  - The contractual and tortious failures of the lawyers which resulted in a costs order against them was found in *Harith v McCrohon* (2009)