Civil Procedure Exam Notes

Definition: Civil procedure is a body of law that governs litigation undertaken by private parties, who are mostly individuals or corporations, however government organisations can be involved. e.g. Queensland v JL Holdings (1997) 189 CLR 146, State of Queensland as customer.

Civil v Criminal Procedure
Criminal procedure governs cases where the state prosecutes an individual or corporation for offences or breaches of law (mostly legislative).

Procedure v Substantive Law
Procedural law governs where and how the claim is to be heard. Substantive law relates to the substance of the claim. Authorities: McKain v R W Miller & Co (SA) Pty Ltd and Pfeiffer Pty Ltd v Rogerson (2000).

Mason CJ puts forward in McKain, procedures are 'rules which are directed to governing or regulating the mode or conduct of court proceedings'.

In Pfeiffer Pty Ltd v Rogerson, the High Court outlined two guiding principles on the need to distinguish between substantive and procedural issues:
1. Litigants who resort to a court to obtain relief must take the court as they find it. Similarly, the plaintiff cannot ask that the courts of the forum adopts procedures or give remedies of a kind which their constituting statutes do not contemplate any more than the plaintiff can ask that the court apply any adjectival law other than the laws of the forum
2. Matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face appear to be concerned with issues of substance, not with issues of procedure.

Procedural law and justice
Civil procedure is constantly striving to achieve a balance between speedy, cheap and efficient litigation allowing justice to be accessible to everyone. The law must also be developed carefully and thoughtfully giving the parties time to prepare their cases properly. Common problems faced include:

• Right to a fair trial might not be achievable due to insufficient funds or inequality in access to funds
• Lack of funding raises the issue of access to justice
• Litigation could be used to intimidate and run people out of funds. The term ‘civil’ and ‘adversarial system’ are oxymoronic because the the system encourages war-like disputes. Civil procedure might be the only thing keeping litigants civil
• Intrinsic need for efficiency as justice delayed is justice denied, but if litigation is rushed, can justice be achieved?

Open justice
"It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public...is an essential quality of an Australian court of justice. There is no inherent power of the court to exclude the public.” Spigelman J in John Fairfax Publications Pty Ltd v District Court of NSW (2004) NSW Court of Appeal.
Open justice ensures public faith in the justice system.

Justice can be closed in certain circumstances:

- Closed court orders can be given in family law matters concerning custody of children
- No publication order for defamation
- Pseudonym orders (migrants and children)
- Threat to national security
- Sometimes in criminal cases
- Suppression is required to protect the administration of justice

Regulation of suppression or non-publication orders is currently under review by the Standing Committee of Attorney Generals (SCAG) to create national model rules for suppression and non-publication orders and to create a national register.

Adversarial System

The international legal system is increasingly moving towards a hybrid system between the adversarial and inquisitorial systems. In an adversarial system:

- The parties control dispute, they define and present evidence and argument
- The court’s decisions form precedent that are binding on future decisions
- Trials are lengthy and involve extrinsic evidence
- Judges serve as umpire
- Strong reliance on oral testimony which is adduced from witnesses and is subject to cross examination. Advocates use oral argument in the representation of their cases
- Strong focus on procedural rules
- Clear delineation between pre-trial and trial. Trial is the climactic end of the litigation process
- Trial transcript is used for an appeal

The inquisitorial system:

- Has codified law
- No rigid separation between trial and pre-trial
- Judges are proactive
- Strong emphasis on documentary proof
- Virtually no cross-examination often no physical hearing
- Cases are much shorter generally
- Minimal rules of court room practice.
Case Management

What is case management?
Case management refers to both how courts manage their workload of cases and what a court does in the context of a particular case to manage that case. Case management is the term used to describe the role of the courts in administering and intervening in the preparing of a case for trial. Parties are given directions as to the timing and steps marries must undertake to prepare a case for court including:

- Extent of document discovery
- Volume of oral and written evidence
- Submissions
- Issues in dispute.


Relevant legislation:
- s57 of the CPA “Objects of case management"
- Part 2 of the UCPR
- Federal Court of Australia Act 2009 (Commonwealth) Part VB included in these notes below.

Managerial Judging
The development of case management has given rise to the “managerial judge”. Managerial judging describes the process by which the judge actively uses the court’s powers to facilitate the swift disposition of cases. A managerial judge is not limited to being a passive arbiter of disputes but is an active case supervisor. His or her role is not confined to the courtroom: it begins the moment proceedings are commenced and ends at the time of final disposition. The judge has broad discretion.

Managerial judging is a significant departure from the traditional judicial role, typified by aloofness, stoicism and detachment from the parties. Managerial judging is widely practised by judges of the Supreme Courts of the States, the Federal and Family Courts, the District and County Courts and some lower courts. The overarching principle is “just, quick and cheap disposal of the proceedings (2.1 UCPR)”.

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High Court support for case management
Case management was resurrected in the case of Aon Risk Services Australia Ltd v Australian National University [2009]:

- Facts: Bushfire in Canberra damaged an observatory owned by ANU. ANU sued insurers and insurance broker (Aon). 3 days into the proceedings, ANU settled with insurers. It then applied for leave to amend statement of claims in proceedings against Aon alleging a substantially different case. The application was allowed at trial and Court of Appeal levels in the ACT.
High Court ruled that courts at the trial and appellate level had been ‘unduly permissive’ in allowing late pleadings without adequate explanation.

Overruled *Queensland v JL Holdings* [1997] and found the decision in *JL Holdings* had been inconsistent with previous High Court decisions and should not be applied in future.

ANU did not have a valid reason to amend its statement of claims. The tactical decisions to amend pleadings late in the proceedings without justification cannot be accepted (French CJ). Changes in substantial claims would have been fundamentally unfair for Aon to have to defend an entirely new case.

Unnecessary delay of proceedings is essentially irreparable unfair prejudice that renders the court inefficient, wastes public money and erodes public confidence in the justice system (French CJ).

The court held that all matters relevant to the exercise of the power to permit an amendment should be weighed up by a judge. The factors to be considered include:

- Extent of any delay resulting from the amendment
- Any wasting of costs
- Any case management concerns
- Importance of the amendment
- Potential for prejudice to other parties
- Any explanation for a late amendment; and, importantly,
- How far along the litigation process the matter has advanced by the time the amendment is sought.

This case favoured the managerial judge.

*Queensland v JL Holdings* [1997]:
The High Courts ruled that ‘ultimate aim of a court is the attainment of justice’ (Dawson, Gaudron and McHugh). More emphasis placed on right to a fair and full hearing, but this has happened at the expense of efficiency. If an application for leave to amend a pleading should be allowed on the basis that a party is entitled to make an amendment to raise an arguable claim at any time, then it would be to the detriment of efficiency. The principle that justice delayed is justice denied was sidelined. The result was that many lawyers breached court time causing significant delay.

### Deterrence against litigation

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### Cost of Litigation

Cost is a deterrent to litigation. In most instances, the losing party must pay legal costs of the winning party. This adds significant risk. Cases were cost has become a matter for considerable concern to the parties and the judge include: *Seven Network Ltd v News Ltd* [2007] ‘C7’ litigation.

Justice delayed is justice denied (William Gladstone)

*Hodgson v Amcor Ltd; Amcor v Barnes* [2011] Vickory J said ‘delay is a natural enemy of justice’. Delay means less evidence will be available. It increases costs to the parties. There are also insidious social and indirect commercial costs, unmeasurable costs include
stress on the litigating parties. This case was with regards to the toll on Hodgson due to Amcor’s failure to deliver its witness statements in accordance with the orders of the court.

Emotional Stress

*Richards v Cornford (No 3) [2010]* case heard in the NSW Court of Appeal:

Litigation is unavoidably stressful and costly but litigation should be resolved in a reasonable amount of time so as to minimise the strain brought upon the parties. In this case, the court denied the second defendant QBE to be heard because it ruled that it would be more unjust to allow the delay than to deny QBE the right to be heard.

*Federal Court of Australia Act 2009 (Commonwealth)*

Part VB—Case management in civil proceedings

37M The overarching purpose of civil practice and procedure provisions

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and
(b) as quickly, inexpensively and efficiently as possible.

(2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;
(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
(c) the efficient disposal of the Court’s overall caseload;
(d) the disposal of all proceedings in a timely manner;
(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The *civil practice and procedure provisions* are the following, so far as they apply in relation to civil proceedings:

(a) the Rules of Court made under this Act;
(b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Court.

37N Parties to act consistently with the overarching purpose

(1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.
Matters Preceding Litigation

Preliminary court process (often heard *ex parte*)

Preliminary discovery
(see 5.2 of UCPR and 7.22 FCR)

Urgent injunction necessary for protecting a party’s litigation rights

Search Order (Anton Piller)

Freezing Order (Mareva Order)

**Preliminary discovery**

Preliminary discovery is discovery granted prior to any claim being filed in court. There are limited circumstances where a court will grant discovery before proceedings have commenced. These circumstances are essentially those where it is impossible for the plaintiff to commence its claims without further information, such as:

- If the applicant cannot identify the respondent and needs that information from the third party, this can be written or oral
- If the applicant needs crucial facts in order to proceed with claim
- Underpinning these exceptions are that the applicant has a reasonable belief that he/she may have a right to obtain relief from the respondent and that the applicant has taken reasonable efforts to obtain information required without resorting to a court order.

**Relevant Legislation:**

(s5.1-5.8 UCPR)

- s5.2 - to ascertain prospective defendant’s identity and whereabouts
- s5.3 - Discovery from defendant
- s5.4 - Discovery from other persons

*AstraZeneca AB v Alphapharm Pty Ltd* [2014] FCA: In commercial cases, courts have to way up whether preliminary discovery justifies the costs and risk. In AstraZeneca, preliminary discovery was approved because it needed to establish that Alphaphram was infringing IP by producing a product very similar to Nexium. Preliminary discovery revealed ingredients.

**Anton Piller Order**

Also called a search order, is granted by courts to allow a party to seize documents without notice from another party where it is likely the documents would otherwise be destroyed by that party to prevent their use in litigation.

**Relevant Legislation:**

(s25.18-25.24 UCPR)

- 25.20 - requirements for grant of search order
- 25.22 - Terms of search order

Kenny J in *C.T. Sheet Metal Works Pty Ltd v Hutchinson* [2012] said:
• These orders are intrusive and potentially disruptive
• The purpose of the order is to “secure or preserve evidence” and must not be used as an investigative tool
• Materials seized cannot be used to second guess whether the opposite party will comply with discovery obligations
• The applicant’s lawyer’s undertaking includes an undertaking not to disclose to the application any information that the lawyer has acquired during or as a result of execution of the search order without the leave of the court.

In this case, the lawyer’s lawyer should not have disclosed emails he found from the opposite party to his clients. Voluntary disclosure of breach of conditions not held as contempt of court in this case.

**Mareva Order**
Also called freezing orders. These orders are made by the court to freeze certain assets of a party so as to prevent those assets from being dissipated or hidden offshore, which might render final judgement in the substantive case useless.

**Relevant Legislation**

*Deputy Commissioner of Taxation v Hua Wang Bank Berhad [2010] FCA:*

• Applicant has to establish prima facie cause of action against respondent
• Applicant has to establish that there is a ‘danger’ or ‘real risk’ that a judgment debt will go unsatisfied because assets are removed from the jurisdiction or disposed of in some way
• However, depending on the circumstances, the interest of justice may support the grant of a freezing order to prevent the dissipation of assets pending the hearing of an action even though the risk of dissipation is less probable than not
• Freezing orders can be granted even though there is no evidence of the respondent’s positive intention to frustrate a judgment

**Lawyer’s responsibilities**

**Limitation Periods**
Limitation period may apply depending on the nature of the claim, the location of the claim, what statutes, if any, govern the claim and the nature and timing of the loss of damage suffered.

Most commonly 3 or 6 years with 6 years being the common default period. Breach of contract generally 6 years commencing day contract was breached; personal injury claims generally 3 years from the date injury was discoverable. In NSW, relevant legislation is *Limitation Act 1969.*

Limitation periods exist because:

• Justice delayed is justice denied
• Destruction and compromise of evidence can occur over time
• Oppressive/cruel to leave open ended the amount of time during which the defendant could be pursued with litigation. The defendant would be unable to order affairs with lingering potential of liability
• Public interest demands quick settlement of disputes