Civil Procedure Lecture Notes

Lecture 1: Overview of a Civil Proceeding

- Civil dispute
  - Any legal dispute that is not a criminal dispute
  - Could be either a public or private law matter
  - Includes 'relatively' minor matters
  - Dispute is about a disagreement about specific issues or about isolated actions and/or inactions
- What is the civil justice system?
  - The institutions and services that assist people to resolve civil disputes and prevent disputes from arising
  - "….combination of institutions and individuals authorised by the state to resolve disputes and, in so doing, set and enforce standards of behaviour for those belonging to the state" – the people that are involved must be authorised by the state
  - It includes:
    - The laws and legal framework;
    - Services that provide information and advice in relation to legal problems and events that people might experience, including informing them of their legal rights;
    - Providers of legal and related services, including legal advice, assistance, advocacy, dispute resolution and representation;
    - Primary decision makers/public officials (including ministers) making decisions affecting rights. Dispute resolution services that help people negotiate their own solutions;
    - Complaint handling bodies;
    - Partially or wholly government funded dispute resolution services that help people negotiate their own solutions;
    - Tribunals; and
    - Courts.
- Purpose: "**It is the method by which the state - the government - enforces the legal rights and obligations of citizens**. The law, whether enacted by Parliament or declared by judges, defines those rights and obligations. Their existence raises the possibility of disputes, either between citizens, or between the government and citizens. The courts exercise the judicial power of government, which **secures justice, and keeps the peace, by enforcing the civil law and imposing the will of the state on disputing parties**".
- 2 basic purposes for civil justice system:
  - System by which people may vindicate their rights; and
  - Resolve their disputes under the auspices of the state.
- Essential component is access to justice – system must be
  - Equally accessible to all; and
  - Lead to results that are individually and socially just.
- The purpose of the system is for courts to provide equal justice for all according to law impartially, fairly, without unjustifiable delay and with the minimum but necessary use of public resources.
- Civil procedure "…constitutes the mechanism of the system for the administration of civil justice". It includes the rules, procedures and practices governing the process of the determination/adjudication and enforcement of civil disputes.
- How are civil disputes resolved?
  - Formal justice - adjudication or resolution through court or tribunal system.
  - Informal justice – resolution through bodies and institutions given power or recognition by government (e.g. industry ombudsmen) and other private bodies e.g. private dispute resolution services.

    - Everyday justice - resolution by the parties.
- Court/tribunal resolution of civil dispute
    - Using the coercive power of the State to resolve a dispute, for example:
        - Trial at which dispute will ultimately be adjudicated;
        - Court order.
    - State does NOT recover its actual costs in providing the court, judge, court staff etc. from the parties.

Overview of the civil court system

- Controlled by parties
- Juries principally act as finders of fact
- Role of court/judge is relatively passive and non-interventionist
- Procedural requirements subservient to determination of substantive legal dispute between the parties.
- Criticisms of the adversarial system
    - Expensive
    - Too slow in bringing cases to a conclusion
    - Lack of equality between wealthy, well-resourced litigant and under-resourced litigants
    - Too adversarial (one party against another, not reaching a resolution)
    - Rules of court are too often ignored by the parties and not enforced by the courts

Reforms

- Greater control over the conduct of litigation – case management
- Movement towards minimising the use of courts and adjudication to finalise cases
- Near removal of jury trials
- Additional professional obligations on lawyers

Case management

- Rationale is to reduce cost and delay; and ensure avenues for resolution before the trial
- Introduces court role in determining the pace of litigation
- Rules and/or practice directions are set up management scheme
- Different models in different Australian jurisdictions
- Parties still control issues and evidence
- Rule 5 of the UCPR - Philosophy — overriding obligations of parties and court
    - The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
    - Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
    - In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
    - The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.
    - Example - The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court.
- Rule 5 sets out overriding objectives used to interpret other provisions in the UCPR;
- Case flow management was introduced to give practical effect to rule 5.
- Courts have made it clear that "[parties] do not have an inalienable right to a hearing on all issues on the merits": *Ridolfi v Rigato Farms Pty Ltd*.
- All civil cases: general practices/requirements:

  - Directions: either party can apply for or court may make at any stage of proceedings: rules 366 and 367;
  - Parties can consent to participate in ADR or court may order it;
  - Rule 469 of the UCPR – proceedings set down for trial after a request for trial date signed by all parties filed (extra requirements for personal injury matters).
- Supreme Court:
  - Practice Direction 4 of 2002 "Case Flow Management – Civil Jurisdiction"
  - Practice Direction 6 of 2000 "Supervised Case List" – for longer trials – only relates to the pre-trial management of cases. This may include regular review hearings
  - Practice Direction 3 of 2002 – "Commercial List" (as amended by Practice Direction 2 of 2008 – changed the rule in relation to which rules can end up on the commercial list – commercial cases need to be of 10 days or less)
- District Court:
  - Practice Direction 3 of 2010 "Commercial List: District Court" (assigns the case to a specific judge – this judge hears the applications for the matter and the final matter)
- Failure to comply with the rules or case management?
  - Raises potential conflict between justice (including giving parties adequate opportunity to fully investigate and present their claims) and efficiency, cost and timeliness.
  - *State of Qld v JL Holdings Pty Ltd*
    - Minister refusing to approve a lease over some property that they were holding to take out on Kangaroo Point. JL Holdings took action on a number of grounds.
    - The matter was set down for trial, 6 months before the trial they sought leave to amend the pleadings. Initially leave was refused at the first instance – as not refusing it would jeopardise the trial dates.
    - HC held, overturned this decision, cases need to be determined on merits and only in exceptional circumstances should case management procedures outweigh this.
    - In our view, the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it 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 taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion.
  - *Aon Risk v ANU*
    - Unanimous judgement –
    - Canberra bushfires – ANU had property that was destroyed by the bushfires. There was an issue with insurance and them taking issue against their insurer and their insurance broker.
    - ANU managed to settle the claim against the insurer in the first few days, however the claim against the insurance broker continued.
    - ANU then sought to amend the claim to plead a new cause of action against the insurance broker and attempted to plead a different contractual issue.
    - The judge allowed the issue to be debated during the course of the 4 weeks. The matter was then appealed.
    - HC, could these procedural issues effect the parties ability to substantiate their claims?
    - "Justice" is not just the needs of parties but public at large;
    - Court will weigh interests of parties against interests of the civil justice system as a whole.

        - ANU should not have been allowed to amend its pleadings.
        - Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a "just resolution" is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that limits may be placed upon re-pleading, when delay and cost are taken into account. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.
- How effective is case management?
    - Some evidence effective in reducing time to conclusion.

Minimising the use of courts and adjudication to finalise cases

- Diversion of some cases away from the courts to other bodies or mechanisms such as:
    - Industry ombudsman;
    - Quasi-administrative schemes e.g. personal injuries or workers compensation which essentially provide “barriers and hurdles to litigation” designed to maximise the prospects of mediated resolutions (de Jersey CJ);
    - Specialist tribunals designed to produce less expensive, less formal, more expeditious outcomes e.g. QCAT.

Limitations or removal of use of juries in civil matters

- Jury trials barred by statute in personal injury proceedings arising out of motor vehicle accidents, accidents at work and medical negligence.
- Judges now have role of finders of fact.

Change in the role of a lawyer

- In the traditional adversarial model of civil litigation, the role of the lawyer was partisan even though duties to client (i.e. representation, to act on instructions and a duty to continue to act) always been subject to overriding duties to court and administration of justice.
- However, there have now been attempts to make less partisan (i.e. more co-operative problem solver) :
    - 1. Impose duty to advise clients and potential litigants about alternatives to litigation: rule 12.3 of Solicitor’s Rule 1997 (Qld)/rule 17.1 of the Australian Solicitor’s Conduct Rules;
    - 2. Impose obligation to maintain independence: rule 13 of Solicitor’s Rule 1997 (Qld)/rule 17 of the Australian Solicitor’s Conduct Rules; and
    - 3. Creation of independent overseer of legal profession – in Queensland Legal Services Commission.
- Changes to the law and rules that lawyers must advise clients of have also (arguably) pushed lawyers to be less partisan:
    - rule 5(3) of UCPR– implied undertaking upon parties to proceeding to proceed in an expeditious way;
    - introducing formal offers to settle that may have costs consequences: rr 360 and 361 UCPR;
    - introducing rules that attempt to limit expert evidence to a single expert: r423 UCPR; and
    - over time, seemingly greater willingness of courts to strike out proceedings for failure to comply with the rules.

Future directions

- "Trials, civil and criminal, continue to grow in length, especially in Brisbane. This expansion in the number of days committed to trials inhibits the court's capacity to dispose of its workload as quickly as the judges would wish. It also adds to expense, both public and private. Earlier, more intensive judicial case management is needed to try to address some of the causes of this ongoing inflation."
- Better Resolution Group in Qld
- 3 main areas of work:
    - ADR
    - Disclosure
    - Case management – looking at ways to reduce issues at trial
- Pre-litigation exchange of information
- Requirements to attempt settlement pre-litigation
- Extending case-management to the trial stage
- User-pays in commercial trials??

- Ongoing problems with litigation
    - Remains an expensive option
    - Unpredictable in terms of outcome
    - Difficult
        - Time consuming
        - Adversarial – not a way of resolving the dispute – more so a clash between parties
        - Physically and emotionally distressing
    - Only provides adjudication to legal issues
- Reasons to advise clients about ADR pre-litigation
    - Duty to advise clients about alternatives to litigation
    - Good client care (achieve the outcomes that the client wants to achieve)
    - Future stator obligation that effectively requires parties to make reasonable attempts to settle before commencing proceedings? (Introduced in NSW and Federal courts)
- Alternative/additional dispute resolution procedures
    - The choice of ADR may be dependent on the type of dispute, the complexity of the claim
    - Mediation
        - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
        - Third party has purely facilitative role i.e. no advisory role.
    - Conciliation
        - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
        - Conciliator has an advisory (not an adjudicative) as well as a facilitative role.
    - Arbitration
        - Parties present arguments and evidence to an independent expert who makes a determination; and
        - Most commonly used in commercial, construction, labour and international trade disputes.
    - Factors to consider when advising a client regarding ADR:
        - What is in dispute;
        - Conflict management history between the parties;
        - The client's priorities and the reason for those priorities; and
        - Attitudes and capacity of the parties.

Notes

- In a civil proceeding the plaintiff's first consideration is to choose the proper forum for litigating the dispute. In Queensland, there are three courts of civil jurisdiction:
    - Supreme Court of Queensland – unlimited jurisdiction in law and in equity. It has whatever jurisdiction is necessary for the administration of justice.
    - District Court of Queensland – civil jurisdiction up to a monetary value of $750,000 over those causes of action listed in s 68 of the District Court Act.
    - Magistrates Court – civil jurisdiction over the causes of action and heads of relief mentioned in the Magistrates Court Act 1921 up to a monetary limit of $150,000.
- Irrespective of the court in which a civil proceeding is pending the same rules of procedure apply, namely the Uniform Civil Procedure Rules 1999. Essentially, the courts function is to determine the facts and arrive at a judgment.
- Commencing proceedings
    - The plaintiff commences a proceeding involving a dispute by filing a claim, in the prescribed form, in the court in which the plaintiff intends to sue. The claim is the formal document giving basic details about the names of the parties and a brief description of the plaintiff's cause of action.
    - The plaintiff's statement of claim, a statement setting out the facts the plaintiff intends to prove by evidence at the trial must be attached to the claim.
    - The court registry accepts the claim form and gives the plaintiff an official stamped copy.
- Service
    - Once the plaintiff has an official stamped copy of the claim, they must deliver it to the defendant, usually by handing it to the defendant personally. This constitutes personal service on the defendant.
    - Beyond notifying the defendant of the existence of a proceeding, service on the defendant creates the courts personal jurisdiction over the defendant. The defendant is liable to be served with a claim only if there is a rule of law pursuant to which service can be effected. Presence within the territorial jurisdiction of the court is sufficient.
    - A defendant who is outside of the court's territorial jurisdiction is liable to be served only if there is a rule of law permitting service. This a defendant who is in a another State is served pursuant to the Service and Execution of Process Act and a defendant who is in a foreign country is served pursuant to r 124 of the UCPR.
- Notice of intention to defend
    - If the defendant intends to contest the plaintiff's claim, the defendant has to file a notice of intention to defend in the court registry and serve a copy on the plaintiff. The defendant's notice of defence must be attached to the notice of intention to defend. The notice of defence sets out the defence the defendant intends to prove at trial.
    - If the defendant fails to file the notice of intention to defence within 28 days of being served with the claim, the plaintiff may request the court to give a default judgment against the defendant if the plaintiff's claim is for non-discretionary relief.
    - The plaintiff has to apply to the court for judgment if the defendant fails to file a notice of intention to defend in a claim for discretionary relief, such as equitable relief or an order requiring the exercise of a statutory discretion.
- Pleadings
    - Pleadings are the documents where the parties set out what they intend to prove at trial. In a personal injury proceeding the plaintiff must also file and serve a statement of loss and damage.
    - Pleadings:
        - Define the issues for determination at trial
        - Govern the range of admissible evidence to be given at trial
        - Indicate whether a trial by judge and jury or judge sitting alone is appropriate
        - Govern the scope of disclosure of documents
        - Influence the sequence of events at the trial
        - Define the scope of any estoppels resulting from the judgment

  - Plaintiff's statement of claim (1st pleading)
    - Sets out the material facts on which the plaintiff will call evidence at the trial
    - For it to be valid, the facts alleged have to show a cause of action known to law. If it fails in this regard the court may strike out the plaintiff's claim and give judgment for the defendant.
    - It must give sufficient particulars so that the defendant will not be taken by surprise at the trial.
    - It must also set out the orders the plaintiff proposes to ask the court to make at trial.
  - Defendants notice of defence (2nd pleading)
    - The defendant must specifically answer each allegation of fact in the plaintiff's statement of claim. In addition, the defendant must set out each fact the defendant intends to prove at the trial. The defendant is not permitted to merely deny the plaintiff's allegations.
    - If the defendant denies an allegation, the defendant has to set out in the defence the reasons for the denial and state why the plaintiff's allegation cannot be admitted. The defendant cannot plead a denial unless the defendant has first carried out a reasonable inquiry about the truth of the plaintiff's allegation and after that inquiry is uncertain of the truth or falsity of the allegation.
  - Plaintiff's reply to defence
    - Where the defence raises matters to which the plaintiff has an answer, the plaintiff may deliver a reply to the defence.
    - There can be no pleadings after the reply.
- Disclosure of documents
  - The parties must advise each other of all documents in their possession or control that are directly relevant to an issue on the pleadings. A party is entitled to inspect any relevant document in the opposite party's possession. A document that is subject to a recognised privilege may be withheld from inspection. The main heads of privilege are:
    - Legal professional privilege
    - Self-incrimination
    - Forfeitures and penalties
    - Oppression
    - Public interest
    - With prejudice communications
- Interrogatories
  - With the court's permission a party may submit written questions to the opposite party asking for the admission of facts the party seeking the admission must prove at trial.
- Summary judgment
  - Either the plaintiff or the defendant may apply for summary judgment. The court may give judgment summarily if the plaintiff or the defendant has not reasonable prospect of succeeding at the trial and there is no need for a trial of the proceeding. Any application for summary judgment is normally made shortly after the pleadings close to bring an early conclusion to a case that does not merit a full trial.
- Default judgment
  - If the plaintiff's claim is for non-discretionary relief the court may give judgment by default if the defendant fails to file a notice of intention to defend within 28 days of being served with the claim.
  - The plaintiff may request a default judgment where the claim is for a debt or liquidated demand, unliquidated damages to be assessed or the recovery of land or goods.
- Alternative dispute resolution
  - Settlement processes are important in all civil proceedings.
  - ADR usually a form of mediation is where the parties themselves submit their dispute to mediation or case appraisal. The court may also order alternative dispute resolution.
- Settlement negotiations

    - Most litigation settles before trial. The parties commonly negotiate settlement of their dispute. They may:
        - Agree on a contractual settlement
        - Make an offer to settle under the UCPR
        - Ask the court to give judgment by consent
- Court control of litigation
    - The court involves itself in the pre-trial preparation of litigation to ensure that costs and delay are minimised. The UCPR authorises the court to give the parties whatever directions are necessary for the proper preparation of a case for trial. The court will ensure that the trial is conducted efficiently.
    - Complicated litigation is often managed by special procedures in the Supervised Case List or the Commercial List.
- Trial
    - Cases that fail to settle proceed to trial. At trial, the court hears the evidence on behalf of all the parties. The court makes findings of fact on the basis of the evidence.
    - Once the facts are determined the court applies a rule of law and thus arrives at a decision or in other words the court gives judgment. Matters concluded by judgment cannot be re-litigated between the same parties in another proceeding. The judgment creates an estoppel binding on the parties as to the issues decided by the judgment.
    - Most commonly a trial is conducted by a judge sitting alone. In some cases in the Supreme Court and District Court, the parties may opt for a trial by judge and jury. Where there is a jury the jury makes findings of fact, stated in the form of a verdict. The judge must then apply a rule of law to the facts. Jury trials tend to be complicated and therefore are rare. They are barred by statute in personal injury proceedings arising out of motor vehicle accidents, accidents at work and medical negligence.
- Costs
    - Generally, the party who is unsuccessful at the trial is ordered to pay the successful party's legal costs. In the sense costs are said to follow the event.
    - Costs paid to the successful party under an order for costs are often called party and party costs. These partially indemnify the successful party against its liability for legal fees.
    - Despite the rule that costs follow the event, costs are always at the courts discretion.
    - In unusual circumstances the court may make another order.
- Enforcing judgments
    - A money judgment is enforceable against the judgment debtor by sale of property of the judgment debtor or by the realisation of intangible property.
    - Debts owing to the judgment debtor may be diverted to the judgment creditor.
    - Non-money judgments are enforced by a means appropriate to the judgment – thus land or goods may be restored to the successful party by an enforcement warrant. A judgment for the performance of an act, for example mandatory injunction, may be enforced by contempt proceedings.

Lecture 2: Jurisdiction

- Jurisdiction refers to the limits upon the matters a particular court is capable of hearing. It is the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a form way for its decision.
- A court's jurisdiction may be limited in terms of :
    - Geography/territory; and/or
    - Subject-matter of dispute.

Territorial jurisdiction (in the context of in personum claims)

- In personum jurisdiction is founded by:
  - **Capacity to serve the originating process**
    - Presence in the jurisdiction under the common law: *Laurie v Carroll*
    - But jurisdiction extended by legislation that enables service within Australia or internationally: Service and Execution of Process Act
    - *Gunns Ltd & Ors v Marr & Ors*: "The Court's jurisdiction to entertain a claim, as with any court whose jurisdiction is not constrained by geographical or monetary limits, is defined by the legal capacity of a plaintiff to serve the Court's originating process: Laurie v Carroll".
  - **Submission to the jurisdiction by:**
    - Filing an unconditional notice of intention to defend; and
    - Express agreement in a contract that a particular court will have jurisdiction.

Subject matter jurisdiction

- Most courts apart from the Supreme Courts have a limited subject matter jurisdiction in their original jurisdiction.
- Most courts have an original jurisdiction and an appellate jurisdiction.
- **Original jurisdiction** is where the court is acting in 'first instance' to determine a matter for the first time.
- **Appellate jurisdiction** is where the court hears and determines an appeal from a decision of a lower court OR in Superior Courts from a decision of the Superior Court in its original jurisdiction.
- *Baxter v Commissioners of Taxation (NSW)*:
  - State jurisdiction is "the authority which State Courts possess to adjudicate under the State Constitution and laws".
  - Federal jurisdiction is "the authority to adjudicate derived from the Commonwealth Constitution and laws".

Federal Jurisdiction

- Federal jurisdiction is the jurisdiction a State or Federal Court has by virtue of Ch 3 of the Constitution.
- *Capital TV Appliances Pty Ltd v Falconer:*
  - The jurisdiction conferred on the High Court by ss 73 or 75 of the Constitution;
  - The jurisdiction Commonwealth Parliament confers on the High Court under s 76 of the Constitution or on some other federal court under ss 71 or 77(i) of the Constitution; or,
  - The jurisdiction which Commonwealth Parliament invests in the State courts under ss 71 and 77(iii) of the Constitution.
- Cairns argues that S 79 of the Judiciary Act creates a further source of Federal Jurisdiction. This says that when a Federal Court is dealing with a State matter, the Federal Court has to use the State laws but when doing that it exercises the Federal jurisdiction.

- Chapter III of the Commonwealth Constitution creates federal jurisdiction as to "matters" concerning the subjects set out in ss 75 and 76 of the Commonwealth Constitution:

- Matters
  - We do not accept this contention; we do not think that the word "matter" in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.
  - Matter is the 'subject matter for determination';

        - E.g. Can one of the parties protect an unregistered a registered trademark – this is the subject matter. The legal proceedings will be commenced for misleading and deceptive conduct, and passing off.
    - The legal right, duty or liability to be established;
        - It cannot be simply an advisory opinion or abstract questions of law.
        - However, declarations are not advisory opinions as long as they relate to a real interest of one of the party's.
    - There is a controversy between the parties the quelling of which the judicial power of the Commonwealth must is invoked: *Re McBain*

- Concerning the subjects in ss 75 and 76
    - Section 75 of the Constitution provides the High Court has original jurisdiction in all matters:
        - arising directly under any treaty;
        - affecting consuls or other representatives of other countries;
        - in which the Commonwealth is a party or a person is suing or being sued on behalf of the Commonwealth;
        - between States, or between residents of different States or between a State and a resident of another State
          [NOTE: corporations do not fall within "resident" in section 75(iv) of the Commonwealth Constitution: *Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290]; and
        - matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.
    - Section 76 of Const provides the Commonwealth Parliament <u>can</u> make laws conferring original jurisdiction on the High Court in any matter:
        - Arising under the Constitution or involving its interpretation;
        - Arising under any laws made by the Commonwealth Parliament;
        - Of Admiralty and maritime jurisdiction;
        - Relating to the same subject matter claimed under the laws of different States.
- Sections 75 and 76 of the *Commonwealth Constitution* identify federal jurisdiction by characteristics such as:
    - The parties involved;
    - Remedy sought;
    - Content; and
    - Source of the rights and liabilities in contention. (treaties and diplomats etc.)
    - *ASIC v Edensor Nominees:* ASIC was simply a party but this was enough to create Federal jurisdiction.
- Something can fall within Federal jurisdiction even if it does not relate to a piece of Commonwealth legislation e.g. if the Commonwealth is a party to litigation.

Jurisdiction of the Federal Courts

- Commonwealth Parliament has power to create federal courts and to confer federal jurisdiction on those federal courts and any other courts (including State courts): section 71 of the Commonwealth Constitution.
- Section 77 of the Commonwealth Constitution – empowers the Commonwealth to make laws with respect to any of the matters in ss 75 or 76. These laws can define the jurisdiction of any Federal court; however they cannot take away the original jurisdiction of the High Court.
    - Under s 77 they can also pass laws defining the extent to which the jurisdiction of the Federal Court will be exclusive of that which belongs to or is vested to the courts of the State.
    - Also under s 77, they can make laws vesting a State Court with Federal Jurisdiction.
    - S 77 is not limited to Supreme Courts it includes any courts of the State.

High Court

- **Original jurisdiction**
  - Matters set out in section 75 of Commonwealth Constitution are part of the original jurisdiction of the High court
  - Section 38 of the *Judiciary Act* 1903 grants High Court exclusive original jurisdiction in relation to:
    - matters arising directly under any treaty;
    - suits between States or persons suing or being sued on behalf of States;
    - suits by the Commonwealth against a State;
    - suits by a State against the Commonwealth;
    - matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.
  - High Court has original jurisdiction in relation to matters arising under the Constitution or involving its interpretation: section 30(a) of the *Judiciary Act* 1903.
  - S 44 of the Judiciary Act allows the High Court to remit matters to other courts that are in its original jurisdiction.
  - S 39 provides that the jurisdiction of the High Court is exclusive of the jurisdiction of the State Courts, except as far as s 39 invests the State Courts with Federal jurisdiction. It then invests the State courts with federal jurisdiction in all matters where the High Court has, or can be given original jurisdiction.
  - S 39 expressly provides that State Courts do not acquire jurisdiction to the matters mentioned in s 38.
- **Appellate jurisdiction**
  - Primary function of HC;
  - Section 73 of the Commonwealth Constitution – HC has jurisdiction to determine appeals against any judgement, decree, order or sentence of any:
    - Justice/s exercising the original jurisdiction of the HC
    - federal court;
    - court exercising federal jurisdiction;
    - Supreme Court of a State.
  - Need special leave to appeal to the High Court

Federal Court

- **Original jurisdiction**
  - Court of statutory jurisdiction. It only has its jurisdiction from legislation.
  - Superior court of record: section 5 of *Federal Court of Australia Act* 1976 (Cth).
  - Section 39B(1A) of the *Judiciary* Act 1903 (Cth) provides the Federal Court's original jurisdiction includes any matter-
    - where a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
    - where the Commonwealth is seeking an injunction or a declaration;
    - arising under the Constitution or involving its interpretation;
    - ***arising under any laws made by the Commonwealth Parliament, other than a matter as to a criminal prosecution***.
- **Appellate jurisdiction**
  - Section 24 of the *Federal Court of Australia Act* 1976 (Cth)
- **Accrued Jurisdiction to determine non-federal issues**

- If a 'matter' includes both Federal and non-federal components, then in some circumstances the Federal court may have an accrued jurisdiction to deal with the entire matter.
- Based on sections 76(ii) and 77(i) of the Commonwealth Constitution and sections 19 and 22 of the *Federal Court of Australia Act* 1976 (Cth).
- To come within the accrued jurisdiction the federal and non-federal claims must fall within the scope of the one controversy.
- The non-federal aspect of case must be so linked to federal aspect that it cannot be severed: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*
    - TPA s 52 action and passing off action brought. Can these both be dealt with by the Federal Court?
    - It may appear that the resolution of the attached claim is essential to a determination of the federal question. Likewise, it may appear that the attached claim and the federal claim so depend on common transactions and facts that they arise out of a **common substratum of facts**. In instances of this kind a court which exercises federal jurisdiction will have jurisdiction to determine the attached claim as an element in the exercise of its federal jurisdiction.
    - The facts don't have to be exactly the same to prove both federal and non-federal claim.
    - CH, passing off was part of the breach of s 52 of the TPA and so it was a single matter.
- *Fencott v Muller*
    - Though the concept of "matter" may be narrower than that of a "legal proceeding", it is a term of wide import. The word 'matters', Griffith C.J. said in South Australia v. Victoria, "was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice". The concept of "matter" as a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy, was accepted by a majority of the Court in Philip Morris.
    - Matter is broader than individual legal proceedings.
- *Re Wakim; Ex parte McNally*
    - Wakim won a personal injuries claim against one of the partners of the partnership business that he used to work for. He was awarded damages.
    - The partner that he successfully sued was declared bankrupt.
    - The partner's trustee in bankruptcy engaged a lawyer (barrister) to take action against the other partner in the partnership. This happened to be the wife of the original partner.
    - This claim was settled out of court. Part of the settlement included an agreement to pay $10,000 to Wakim. This was a small portion of what was owed to Wakim.
    - Wakim sued the trustee in bankruptcy in negligence and also for breach of duty as a trustee under the Bankruptcy Act (Commonwealth legislation) in the Federal Court.
    - The basis of both claims (negligence and breach of duty) was based on the fact that they should not have settled with the wife for such a small amount.
    - They later sort to join claims in negligence with the solicitors and barristers who were involved in the settlement negotiations. They had failed to advise the trustee of its rights against the wife.
    - The court had to determine if the Federal Court had jurisdiction to determine the claims in negligence against the solicitors and barristers. The claim against the barristers and solicitors was based on slightly different facts, and both based on negligence (common law issues). Could the additional claims against the barristers and solicitors be joined to this proceeding against the trustee which did have a federal component to it?
    - CH, that they could join the additional claims and have them heard together. They said that each of these proceedings brought by Wakim centres on the making of claims and brining of an action against the second defendant (who the settlement was made with). The prosecution and settlement of those claims and that action.

        - This was one controversy and all the claims flowed from the one controversy.
        - In Wakim's case judgment against one defendant would effect Wakim's ability to claim from the other parties.
    - If there are matters brought in different courts, then there may be conflicting findings given by the courts in relation to the same proceedings. If the courts can reach two different findings on the same facts, this suggests that it is a single matter.
    - If what the parties are claiming in both actions is essentially the same, then this suggests a single matter.
    - If one matter will determine whether the other matter is brought in another court, this also suggests one matter.
    - Look at the facts and then look at what they are seeking.
    - What happens if you suddenly stop the federal component of a dual action? The Courts have held that you do not need to stop and transfer it to a State court. As long as the Federal claim was tenable at the time it was made, then the Federal Court will continue to have an accrued jurisdiction. If it is untenable or not genuinely pursued, then the accrued jurisdiction will not continue to exist.
    - Accrued jurisdiction is discretionary.
    - S 79 of the Judiciary Act states that the Federal Court must apply the law of the relevant state or territory to resolve the non-federal issue. However, it is still exercising the Federal jurisdiction: *ASIC v Edensor Nominees*

- **Associated Jurisdiction**
    - Not as important since section 39B of the *Judiciary* Act 1903 (Cth) was enacted. This gave the Federal Court a very broad jurisdiction.
    - Essentially allows court to determine a federal cause of action under legislation that does not vest jurisdiction in the Federal Court: section 32 of the *Federal Court of Australia Act* 1976 (Cth).

- Exercise of Federal jurisdiction by State courts
    - Section 39(1) of the Judiciary Act:
        - provides that the jurisdiction of the High Court is exclusive of the jurisdiction of the State courts, except as far as s 39 invests the State courts with federal jurisdiction:
        - invests State courts with federal jurisdiction in all matters where the High Court has, or can be given, original jurisdiction: and
        - expressly provides that the State courts do NOT acquire jurisdiction in the matters mentioned in s 38.
    - The HC has exclusive jurisdiction over everything in s 38 of the Constitution. The States have federal jurisdiction in all matters where the Constitution provides that the High Court shall have original jurisdiction (s 75 and 76). However, certain Commonwealth legislation prevents certain matters from being heard in state courts.
    - When State courts are exercising Federal jurisdiction it retains its character as federal jurisdiction. However any monetary limits that apply to State Courts under State legislation continue to apply.

State Jurisdiction

- Everything that doesn't fall in the Federal legislation. It is very broad.
- Supreme Court
    - Original jurisdiction
        - The court has "all jurisdiction that is necessary for the administration of justice in Queensland: *Constitution of Queensland*, s 58(1);

        - *Kelly v Apps* means the court has the ability to "right any wrong that may occur in the administration of justice".
        - Generally does not consider matters with a monetary value of less than $750,000 unless the lower courts cannot deal with it.
    - Inherent jurisdiction
        - Derives from status as superior court of record.
        - Inherent jurisdiction to properly exercise its powers, perform its functions and control abuse of process *Riley McKay Pty Ltd v McKay*.
    - The Supreme Court is a superior court of record. Therefore there is a presumption that it has jurisdiction.
- District Court
    - Broad common law jurisdiction – however, the only jurisdiction they have is that conferred on them by legislation. There is no inherent jurisdiction; they can only deal with something if the statute confers it onto them.
    - Section 57 of the Constitution of Queensland establishes the District Court.
    - s 8 of the *District Court of Queensland Act 1967* provides that the District Court is a court of record with such civil jurisdiction as is prescribed by the Act
    - District Court is an inferior court: *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd*
    - Statutory jurisdiction conferred by:
        - Section 68(1) of the *District Court of Queensland Act 1967*, the DC has jurisdiction over:
            - personal actions including claims for the detention of goods, rent or mesne profits and for any debt, damages or compensation arising under an Act; and
            - equitable claim or demand for the recovery of money or damages, whether liquidated or unliquidated;
        - Section 68(2) of the *District Court of Queensland Act 1967* provides the District Court with jurisdiction over specific actions and matters;
        - Section 69 of the Act gives the District Court certain of the powers of the Supreme Court in respect of the matters where the District Court has jurisdiction;
        - Other Queensland legislation; and
        - Commonwealth legislation.
        - Monetary limit of $750,000.
- Magistrates Court
    - Created by statute as inferior court of record;
    - Civil jurisdiction in the terms prescribed by statute.
    - Common law jurisdiction over personal actions.
    - Only equitable jurisdiction is for money claims in equity.
    - Monetary limit of $150,000.

Cross-vesting

- A way in which a State's jurisdiction is extended.
- Original cross vesting scheme
    - The Federal Court and the Family Court were given the civil jurisdiction of the State and Territory Supreme Courts in State matters;
    - State and Territory Supreme Courts were given the jurisdiction of each other in State matters; and,
    - Federal jurisdiction was invested in State Supreme Courts and jurisdiction was conferred on Territory Supreme Courts (including the Australian Capital Territory and the Northern Territory) in respect of a matter where the Federal Court or Family Court had jurisdiction and the State or Territory Supreme Court did not have jurisdiction.

- In 1999, the High Court held that the bit referring to the State Jurisdiction being vested in the Federal and Family Court was unconstitutional because under Ch 3 of the Constitution only the Federal Parliament can give jurisdiction to Federal Courts: *Re Wakim*.

- Cross-vesting remains valid for:
  - **cross-vesting jurisdiction in State matters among the State and Territory Supreme Courts;**
  - ***investing federal jurisdiction in State Supreme Courts in a civil matter where the Federal Court or the Family Court have jurisdiction and the Supreme Court does not have jurisdiction;***
  - conferring the jurisdiction of the Federal Court and the Family Court in civil matters on the Supreme Court of the Territories, including the Australian Capital Territory and the Northern Territory, where the Federal Court or the Family Court have jurisdiction and the Supreme Court does not have jurisdiction; and
  - conferring the jurisdiction in civil matters of the Supreme Courts of the external Territories on the Federal Court and the Family Court and the Supreme Courts of the other States and Territories.
  - Does not apply to inferior courts – District or Magistrates
- Cross Vesting State Jurisdiction
  - State Supreme Courts are conferred with the original and appellate State jurisdictions of other Supreme Courts: *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Qld) s 4
  - State Supreme Courts MAY exercise jurisdiction of other SCs conferred on them by legislation: *Jurisdiction of Courts (Cross-vesting) Act* 1987 section 9
  - A party who seeks to invoke the cross-vesting laws must endorse the pleadings with a statement identifying each claim or defence in respect of which the cross-vesting laws: UCPR r 53;
  - The party invoking the cross-vesting laws must apply for directions and any consideration of whether the matter should be transferred: UCPR r 56
  - The Supreme Court can remit matters to the lower courts.
- Transfer of proceedings
  - ‘‘The cross-vesting legislation passed by the Commonwealth, the States and the Territories both conferred on each of the ten courts Australia-wide jurisdiction and set up the mechanism regulating the transferring of proceedings from one of these ten courts to another. In relation to transfer, the common policy reflected in each of the individual enactments is that there must be a judicial determination by the court in which proceedings are commenced either to transfer or not to transfer the proceedings to one of the other nine based, broadly speaking, upon consideration of the interests of justice . . . It calls for what I might describe as a ‘nuts and bolts’ management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute.’’
  - This is designed to prevent ‘forum shopping’.
  - Section 5 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 deals with:
    - **1. Related proceedings in:**
      - a Supreme Court (the first court) and another State Supreme Court, the Federal Court or the Family Court (the second court);
      - the Federal Court or the Family Court (the first court) and a State Supreme Court (the second court) ; AND
    - **2. Proceedings where a Supreme Court ONLY has cross-vested jurisdiction OR a substantial part of the proceedings is cross-vested jurisdiction.**

  - 1. Related Proceedings (s 5)
    - The first court MUST transfer the proceedings to the second court if:
      - The proceedings before the first court arise out of, or are related to, another proceeding already commenced in the second court; AND
      - The first court believes:
        - The second court is the “more appropriate” forum; OR
        - It is otherwise in the interests of justice.

- N.B. If the second court is the Federal Court or Family Court, only proceedings involving a federal matter can be transferred – Federal courts CANNOT exercise State jurisdiction.

- The range of factors considered relevant in assessing which is the "more appropriate forum" are (*World Firefighters case*):
  - the application of the substantive law, if it is peculiar to a particular jurisdiction;
  - forensic advantages or disadvantages conferred by the competing procedural laws;
  - the plaintiff's choice of forum and the reasons for that choice;
  - substantive connections with the forum (e.g. residence, domicile, place of occurrence and choice of law);
  - balance of convenience to parties and witnesses;
  - comparative cost and delay;
  - convenience of the court system.
- *Wright & Blakwell & Ors*
  - CH, that proceedings should be transferred to NSW
  - There is a substantive connection with Queensland and Queensland law in the Queensland action. The proposed consolidation or its failure gives rise to potential complications. If the consolidation application fails then the actions will proceed separately in any event. If it survives there will be a range of complexities because of the inconsistencies referred to earlier.
  - On the other hand a successful uncomplicated consolidation offers the possible binding resolution of the issues in both the actions. Whether that would lead to a quicker and cheaper outcome is an open question.
  - ***If the actions proceed separately there could be inconsistent outcomes.***
  - The defendant in the Queensland action has filed a conditional defence based on considerations favouring New South Wales' jurisdiction.
  - The first third party in the Queensland action had declined to indemnify the defendant in that action on a similar basis.
  - There is a prospect, inadequately dealt with in the material, that the consolidated actions will be more protracted and expensive for the first third party, if not other parties.
  - The balance of convenience to parties and witnesses, if no other considerations, would probably favour a trial in New South Wales.
  - There is little advantage for either venue in terms of delay, convenience of the court system does not seem to be a factor. There is no significant forensic advantage or disadvantage conferred by competing procedural laws.
  - The trial of the consolidated proceedings in New South Wales would be more costly than the trial of the Queensland proceedings. It is not possible to say whether it would be more costly to have separate proceedings in New South Wales and Queensland than it would be to have the consolidated proceeding although it may be more likely.
  - This was not a case of Cross Vesting Legislation, the court simply held that NSW was a better forum.
- Interests of Justice
  - Interests of all the parties must be taken into account.
  - Court weighs up the following factors:
    - Convenience and expense of each forum;
    - Availability of witnesses;
    - Location of the parties;
    - Procedural advantages of each forum; and

- The substantive law to be applied to determine the case.
- *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400

- 2. Court only has cross-vested jurisdiction
  - A court MUST transfer the proceedings before it to another court if it appears to the court that:
    - Only has cross-vested jurisdiction for the proceeding or a substantial part of the proceeding is cross-vested jurisdiction; and
    - Either:
      - In the "interests of justice" it is "more appropriate" to determine the proceeding in another court; or
      - It is otherwise in the interests of justice.

- Transfer of proceedings
  - Section 13 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 provides there is no appeal from a Supreme Court's decision regarding transfer of the proceedings under the Act.
  - A party can seek the leave of the High Court to appeal from a Supreme Court's decision regarding transfer of the proceedings under the Act pursuant to section 73(ii) of the Commonwealth Constitution.

Lecture 3: Commencing Proceedings

- The form of the originating process in civil proceedings is prescribed in the rules. Commonly, the originating process describes the parties and gives the formal particulars, their residential addresses and addresses for service, contact details and an adequate identification of the cause of action asserted.
- There are a few key principles underlying the requirements in relation to originating proceedings:
  - Open justice: justice should be done in public
  - Each party should have a reasonable opportunity to present their case which requires them to know the case against them
  - Need for efficiency of court processes

- The court must issue an originating process e.g. claim, application, notice of appeal, notice of appeal requiring leave.

- Time of commencement of proceedings – A proceeding is brought or commenced when the originating process is sealed and issued by the court registry: r 8.

- Claim
  - Rule 9 of the UCPR – must commence by claim unless allowed or required by the UCPR to commence by application

- Application
  - Rule 10 – must start the application if you have to apply to court for a statutory order and the relevant legislation does not state the type of proceeding to be used
  - Rule 11 – may bring an application if:
    - The only or main issue is an issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely; or
    - There is no opposing party to the proceeding or it is not intended to serve any person with the originating process; or

        - Insufficient time to prepare a claim because of the urgent nature of the relief sought.
    - Application sets a summary process of what is at dispute as contrast with a claim. It is possible to make applications in the course of a proceeding e.g. interlocutory application for further disclosure in connection with an existing claim (this does not commence a new proceeding, but an application made in the course of an existing process)
    - Rule 13 and 14, allow a court to change a claim from a claim to an application and vice versa.

- Form of the originating process
    - Application – Form 5 (Oral application under r 12 UCPR)
    - Claim – Form 2 (r 17-19 and 22 UCPR)

- Describe the parties
    - An adequate description of the parties on the originating process is essential: *Cameron v National Mutual Life Insurance Association of Australia Ltd*
    - Proceedings must be public to ensure that justice is impartially administered – they must demonstrate that the process is fair and free from corruption and special dealing for selected litigants. This further underpins the independent status of the courts and the judiciary: *Russell v Russell*.
    - *J v L & A Services Pty Ltd*
        - A husband and wife worked for a pathology lab, both alleged that they contract aids as a result of the negligence of their employer.
        - They wanted to sue in the initial J, because they were concerned about their children and themselves being discriminated against.
        - The court held, that a loss of privacy, embarrassment, distress, financial harm or other collateral disadvantage are not reasons for not having to sue in your full name.
        - CH, they had to sue in their full name.

- Claim
    - A claim must be issued by the court for it to take force
    - Claim remains in force for 12 months: rule 24(1) UCPR
    - Can renew claim
    - Claim is ‘stale’ after 12 months if not renewed.
        - This means that service of it is not effective;
        - It is an irregularity not a nullity: r 371 of the UCPR
        - It can be made effective if:
            - The defendant serves an unconditional notice of intention to defend; or
            - The court waives the irregularity: *Gillies v Dibbetts*

- Renewal of the claim
    - A claim (including a stale claim) may be renewed, at the court’s discretion, if the registrar or the
    - court is satisfied that either:
        - a) reasonable efforts have been made to serve the defendant; or
        - b) there is another good reason to renew the claim.
    - *Muirhead v Uniting Church in Australia Property Trust*
    - Even after the end of the limitation period – UCPR s 24

Pleadings

- The principles underpinning the rules in relation to pleadings are:
    - the parties should have notice of the case against them; and
    - the need for civil litigation to be managed efficiently.

- The sequence of pleading is:
  - a) the plaintiff's statement of claim;
  - b) the defendant's defence;
  - c) the plaintiff's reply to the defence.
- The same sequence applies if the defendant makes a counter-claim against the plaintiff. The course of pleading on a counter-claim is:
  - a) the defendant's counter-claim against the plaintiff;
  - b) plaintiff's defence to the defendant's counter-claim;
  - c) defendant's reply to the defence to counter-claim.
- A pleading subsequent to the reply cannot be delivered without the leave of the court.

Statement of claim

- In the statement of claim the plaintiff alleges all of the material facts that show that the plaintiff has a cause of action enforceable against the defendant at the plaintiff's suit. The statement of claim may formulate any question of law the court will be asked to determine. It must also set out the relief the plaintiff claims against the defendant.

Defence

- In the defence the defendant must answer each allegation made by the plaintiff in the statement of claim. In answering the statement of claim the defendant may-
  - admit some, or all, of the plaintiff's allegations;
  - deny, or traverse, all or some of the plaintiff's allegations;
  - plead additional facts to cast the plaintiff's allegations in a different context, ie tender a plea in confession and avoidance;
  - challenge to sufficiency in law of the plaintiff's claim;
  - allege any additional facts which constitute a defence to the plaintiff's claim;
  - allege a set-off or counter-claim.

Reply

- The plaintiff may respond to the defence with a reply, although not for the sole purpose of denying the allegations in the defence. A reply is to raise facts and matters in answer to the allegations in the defence. An example is a defence plea of the lack of writing in an action for the specific performance of a contract for the sale of land. If the plaintiff intends to raise a plea of part performance it should be pleaded in the reply if it eventuates that the defendant raises the lack of writing as a defence.
- There is no need for a reply to merely deny the allegations in the defence. Allegations in the defence are in issue by force of the defence. A reply would though be apposite if the plaintiff intends to admit any allegations made in the defence.

Counter-claim

- If related claims arise out of the disputed transaction, the defendant may plead a set-off or counter-claim. These are separate pleas and different legal concepts.
- A set-off is a defence. A counter-claim is an independent proceeding by the defendant against the plaintiff but the claim and the counter-claim are prosecuted concurrently.
- A defence and counter-claim are pleaded in the same document.

Answer to counter-claim

- A defence to counter-claim answers the allegations in the counter-claim. A defence to counterclaim must be pleaded in accordance with the rules for defences.

- A reply and defence to counter-claim may be set out in the same document.

Reply to defence to counter-claim

- The defendant may deliver reply to the plaintiff's defence to counter-claim. It performs the same function and is subject to the same rules as the plaintiff's reply to the defence.

Close of pleadings

- Pleadings close on the delivery of the last pleading.
- At the close of pleadings there should clear and precise issues of law or fact or of fact and law on which the parties will proceed to trial.

Issues on the pleadings

- The most important function of pleadings is to define the issues between the parties. The issues effect subsequent steps in the proceeding, including, for example, the ambit of disclosure and the evidence that must be presented at trial.

Notice function of pleadings

- In disclosing the issues, the pleadings also give each party notice of the case to be made by the opponent. Sufficient particulars must be set out in the pleading to give notice to the other party of the case to be made at the trial.
- Pleadings also inform the court about the matters that will be required to determined at trial.

Pleadings and the right to judgment

- Pleadings have to be sufficient in law to show a right to judgment. Every pleading has to contain a statement in summary form of the material facts on which the party pleading relies but not the evidence by which they are to be proved. UCPR, r 149

General contents of pleadings

- The general rules of pleading are:
    - a) The material facts of the claim or defence must be pleaded
        - Material facts must be pleaded. The material facts are all those facts that are necessary to constitute the cause of action or defence the party is relying upon. For example, the material facts for a negligence cause of action are those that establish a duty, breach of that duty and the damage that was caused by that breach. UCPR, r 149(1)(b)
        - A party should not try to anticipate the other party's defence.
        - Facts alleged in pleadings are assertions which have to be proved by evidence at trial unless the rules state otherwise. UCPR r 166
        - General allegations in pleadings are supplemented by particulars to control generality and make the nature of the allegations intelligible to the opposite party. A party must give sufficient particulars in a pleading to define the issues and prevent surprise at the trial as well as to enable the opposite party to plead and support any matters specially pleaded under r 150. UCPR r 157
        - The nature and function of particulars is that the opposite party-
            - must be apprised of the nature of the case to be met;
            - must be placed in possession of the broad outlines and the constitutive facts said to raise a legal liability;
            - is entitled to sufficient information to ensure a fair trial and to guard against surprise; but,

        - not the mode by which the case is to be proved against.
    - b) The evidence by which the facts are to be proved must not be pleaded
        - The rules distinguish between material facts and evidence. A fact that is relevant only to establishing an ultimate fact is evidence. Those are the facts which the rules say must not be pleaded. While the distinction is easy to state, it is often difficult to apply. UCPR, r 149(1)(b)
    - c) Conclusions of law must not be asserted as material facts; and
        - Since the first requirement of pleading is that only material facts are to be alleged, obviously matters of law, or legal conclusions or inferences, must not normally be alleged in the pleadings. The court draws whatever legal inferences are open on the findings of fact. It gives judgment on the basis of the findings of fact and the allegations in the pleadings. A party must not plead a conclusion of law as a material fact. Strictly, for the plaintiff to allege, as a purported material fact, a particular cause of action is usually an assertion of a conclusion of law. So long as the facts alleged in the pleadings show a cause of action, the pleading is sufficient. The plaintiff need not actually name which cause of action is asserted.
        - The same is true for the defendant. Where the defendant asserts an affirmative defence, the defendant need only plead facts that show a defence. Which defence is actually raised is a conclusion of law for the court.
        - Distinguishing between fact and law does not prevent either party from raising a point of law in the pleadings.
        - While it is improper to plead allegations of law as matters of fact, the rules, in certain circumstances, require the pleadings to raise matters of law:
            - If a claim or defence under an Act is relied on, the specific provision must be identified. UCPR rr 149(1)(e)
            - As special matters, or permit a party to raise a point of law in a pleading. UCPR rr 149(2), 150
    - d) The pleading must be as brief as the case permits. UCPR rr 149(a), 151, 152

Pleading special matters

- Surprise is further reduced by the requirement in the rules that certain special matters must be pleaded or particularised as well as any matters that would cause surprise at the trial if they were not pleaded. Both factual and legal matters are encompassed by these requirements. UCPR rr 149(1)(c), 150

Particulars of damages

- In Queensland, a party who claims general damages must include in the pleading particulars of the general nature of the loss or damage suffered, the exact circumstances of the loss or damage and the basis on which the amount claimed is calculated or estimated. If practicable, each type of general damage must be pleaded. To properly plead a claim for general damages a party has to identify each head of damage and estimate the amount of damages claimed for each head.
- The Queensland rules require particulars of any claim for special, aggravated or exemplary damages. UCPR r 158
- In most cases, particulars of any claim for interest must be included in the pleadings. UCPR r 159

Lecture 4: Service of Process

Service of a Claim

- In actions in personam, service founds the court's jurisdiction. It will not exercise any of its powers if it has no jurisdiction over the defendant or if it has a doubt about its jurisdiction. Where, by a rule or at common law, the defendant is liable to be served with process, the court has, by virtue of service, jurisdiction over the defendant. The defendant is most frequently liable to be served because of presence within the jurisdiction or because a rule allows the defendant to be served outside the jurisdiction.

- Service establishes the jurisdiction of the court to determine the proceedings
- Service allows the defendant to issue a notice to defend – "The obligation of personal service thereby removes the risk that the jurisdiction of the court over the person named will be asserted, conclusions reached and orders made, without a proper initial opportunity being given to the person named to appear and defend the proceedings.": *Ainsworth v Redd*
- Service instigates the steps for a civil proceeding

Service inside Queensland

- Personal service – Except where there is an express provision to the contrary in the rules, an originating process has to be served on the defendant personally. R 105 UCPR
- Ordinary service – Notices of intention to defend

- Service more broadly
    - Litigation can be part of a broader strategy to influence public perception. So called strategic litigation against public perception (SLAPP).
    - *Gunns Ltd & Ors v Marr & Ors*
        - The article discusses the service of particular proceedings on Alec Marr. He was part of a group of 20 individuals who were known as the 'Gunns 20' in proceedings that Guns commenced in the VSC.
        - The basis for the proceedings against him, were that he was arrested in 1987, in front of a Gunns bulldozer because he was protesting against logging.
        - In Christmas 2004, he was served with a claim along with 19 other people. The claim was for 6.4 million in damages, he could not afford to pay this.
        - Two days after the claim was served – Gunns announced a big new project it was planning on running to pulp mill.
        - This is called 'slap' litigation – strategic lawsuits against public participation. Pieces of litigation that are commenced for a broader strategic purpose. This is to stop people from protesting against an upcoming development or influence people's perception of a particular type of upcoming policy decision.
        - The fact that the claims were served before Christmas was also part of the strategy.
        - Service of proceedings can be used as part of a broader strategy.
        - Gunns had to settle the proceedings and pay a lot of damages. It also galvanised the protest against Gunns and they have suffered significantly.

- What is required by effective service can be effected by:
    - Type of document being served
    - Identity of the defendant
    - On occasions, the type of cause of action

General rules for service

- Service after 4pm deemed to be service on the following "day": rule 103 of the UCPR.

- You are not allowed to serve someone on certain days unless the court orders that you can: rule 101 of the UCPR.
- Claim must be in force. Service of a stale claim is an IRREGULARITY. (Court can waive under r 371)
- An originating process (except a Magistrates Court originating process) has to be serviced on each defendant/respondent **personally**: rule 105(1) of the UCPR.
    - Give the document, or a copy of the document, to the person intended to be served: r 106(1).
    - Leaving the document with someone else to give to the defendant is not personal service: *Scalpelli v Maguire*
        - Document was left with a relative of the defendant with a promise to give it to the defendant, however this was deemed not be personal service.
    - *Major v Australian Sports Commission*
        - Under both arms of r 106
        - The defendant lived out at Pullenvale, the servicer went to the house at around 8.30pm at night and asked are you the person to be served? The defendant responded with who are you? Finally, the defendant said that we're not used to strangers visiting us at night and went inside.
        - The server asked the neighbor, he was satisfied that the person he spoke to was the defendant. The server left the documents in the defendant's driveway.
        - The next morning, the defendant found the documents in the driveway. The court said that it was not effective service under either limb, however it did not make the irregularity a nullity, so it was waived it on these facts as the defendant had received a copy of the documents.
    - If the person does not accept the document i.e. you attempt to serve in a way that would comply with rule 106(1) BUT the defendant will NOT take the document/copy
        - may serve it by putting it down in the person's presence and telling him or her what it is;
        - NOTE must be put down in the person's presence: *Major v Australian Sports Commission – not enough to put it somewhere where they might find it*
        - Can serve a copy – do not need to show the original document with the seal. Do not need to show the person who you are serving the original.
    - Failure to comply with the requirements for personal service
        - Irregularity not a nullity: rule 371(1)
        - Irregular service can be remedied if:
            - defendant files an unconditional notice of intention to defend; or
            - Court declares the service effective: rule 371(2).

Personal Service Exceptions

- 1. Parties agree to alternative form of service
    - Service on party's solicitor pursuant to a written undertaking to accept service: rule 115 of the UCPR;
    - Service in accordance with an agreement: rule 119
- 2. It is shown the defendant has a copy of the document in their possession: rule 117 of the UCPR.
- 3. Service on an agent where the principal is outside the jurisdiction: rule 118 of the UCPR.
- 4. Particular Types of Parties
    - Corporations:
        - Personal service of a Queensland originating process to be effected on a corporation in accordance with the *Corporations Act 2001* (Cth) or another applicable law: rule 107 of the UCPR;
        - Section 109X of the *Corporations Act 2001* (Cth) – allows for service by leaving or posting the document to the company's registered office (ASIC search)
    - Young people i.e. under 18 years of age: rule 108 of the UCPR.

- Person with impaired capacity: rule 109 of the UCPR.
- Prisoners: rule 110 of the UCPR.

Personal Service - Magistrates Court

- Rules 111(1) and (2) of the UCPR: Documents which are required to be personally served may, unless the court otherwise orders, be served by:
  - leaving the document with someone who is apparently an adult living at the person's "relevant address": as defined in rule 112(3) of the UPCR.
  - if the person has a solicitor acting for them, and if the solicitor has:
    - a document exchange box, by leaving the document in the exchange box; or
    - a fax, by faxing the document to the solicitor; or
    - an email address, by emailing the document to the solicitor.
- NOTE: rule 111(3) of the UCPR if the person intended to be served resides or carries on business more than 50km from the nearest court.

Substituted service

- First, personal service is tried, however it fails.
- If it is *impracticable* to personally serve a document, the court may make an order allowing service in another way: rule 116(1).
- Court must be satisfied:
  - Impracticable to personally serve document;
  - Reasonable efforts have been made to effect personal service; and
  - Substituted service has a reasonable possibility of bringing the proceeding to the defendant's attention.
- *Miscamble v Phillips and Hoeflich*
  - "The object of substituted service, the primary object, is to bring to the knowledge of the person in respect of whom substituted service is sought the whole proceedings, so that he can take such steps as he thinks proper to protect his interests and rights. It is not proper to substitute service of process in a court of law when there is no belief that the service will bring the proceedings to the knowledge of the person in question or of any person representing his interests."
- Social media
  - *Citigroup Pty Ltd v. Weerakoon*
    - The court was not so satisfied in light of looking at the - the uncertainty of Facebook pages, the facts that anyone can create an identity that could mimic the true person's identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.
    - The judge was not convinced that this particular person with that profile was the defendant. Also there was a very solid last known address of the defendant available.
  - *MKM Capital Pty Ltd v Corbo & Poyser*
    - Substituted service via Facebook was allowed.
    - The defendant had defaulted on a loan with MKM. MKM had commenced proceedings but the defendants had failed to file a notice of intention to defend.
    - MKM was successful in obtaining default judgment. After default judgment is obtained it must be served on the other party, however MKM had not had much luck in terms of serving the two defendants.
    - They asked for substituted service from the court.
    - MKM was able to prove to the court that the dates of birth and email addresses on the Facebook profiles of the two people actually matched the two defendants. The friends lists

also showed that both were friends. Court was satisfied that service through their Facebook profile was enough to bring it to their intention.

- Service allowed by Twitter:
  - Marshal J of the Federal Court ordered service on an injunction via twitter in connection with the Melbourne school girl.
  - Nude photo proceeding brought by Sam Gilbert. This lady had posted nude photos of him on Facebook and on Twitter.
  - They managed to shut down the Facebook page, she transferred it to her Twitter account.
  - Court ordered that she be served by email and Twitter.
- Need to prove that the profile that is created is linked to the defendant. E.g. consistent birth dates, email addresses, friends, regularity in the person accessing the page.

Service must be proved: r 120.

Service outside Queensland but within Australia

- Service outside of Queensland but within Australia is governed by the *Service and Execution of Process Act* 1992 (Cth) (SEPA): rule 123 of the UCPR.
- Under the SEPA, an initiating process of a State can be served in another State.
- "Initiating process" in the SEPA is broad enough to include a Claim and an Application.
- Do not need to show a connection between the proceeding and the State in which the proceeding is brought before process can be served interstate under the SEPA. The purpose of SEPA is not to work out jurisdiction.
- SEPA defines how to serve different type of people. E.g. if personal service is required in Qld, then the same process must be followed in the other state: s 15 SEPA
- S 9 SEPA: Can service a company by leaving or delivering to a company's registered office or delivering it to a director of a company who resides in Australia.
- Section 21 of the SEPA - If an initiating process has been served under this Division, a court of a State that is not the place of issue must not restrain a party in the proceeding from taking a step in the proceeding on the ground that the place of issue is not the appropriate forum for the proceeding - Cannot stay proceedings on the basis that the most appropriate forum is not selected.
- Section 5 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987.
- Must attach a **form 1 notice** to the initiating process: section 16 of the SEPA (irregularity only).
- Court can order substituted service on a defendant outside the jurisdiction: rule 116(4) of the UCPR.
- Proof of service: section 11 of the SEPA

Service outside Australia

- The rules define the circumstances where the court will assume jurisdiction when process is served in a foreign country. The definition is such that is a connection between the dispute and the forum i.e. State from which the originating process was issued. There must be a connection of either party or the subject-matter with the forum.
- UCPR and some other Conventions define when an originating process can be served in a foreign country.
- Property located inside the jurisdiction: r 124(1)(b)(i)
- Documents affecting property located in the jurisdiction: r 124(1)(c)
- Must meet requirement or service not effective and can be set aside: rule 126 of the UCPR.
- All require a connection between the dispute and Queensland.

Notice of intention to defend

- Filing and serving a notice of intention to defend prevents the plaintiff signing a judgment by default without notice to the defendant. A notice of intention to defend is filed in the court registry and served on the plaintiff or the plaintiff's solicitor.
- Applicable to proceedings commenced by claim: r 134
- Reasons to file a Notice of Intention to Defend
    - Prevents default judgment
    - Notifies court and plaintiff of intention to defend claim
    - Notifies court of position on jurisdiction
    - Unless specifically allowed to by rules, can't take any step in proceeding without first filing it
- Who can enter a Notice of Intention to Defend
    - Generally, only a party to proceedings is permitted to give a notice of intention to defend. An exception is permitted in actions to recover possession of land: r 143
    - Individual
    - Corporation
    - Minors and persons who lack capacity
- Conditional
    - A defendant who intends to contest the jurisdiction of the court or who does not intend to waive an irregularity in the plaintiff's proceeding should enter a conditional notice of intention to defend: r 144.
    - This preserves the defendant's rights and also prevents the plaintiff from signing a default judgment. The form of a conditional notice to defend should be such as to preserve the defendant's rights to take any objection open concerning the originating process, service or the court's jurisdiction.
    - Rule 144 of the UCPR;
    - Use if plan to argue procedural irregularities and objections to jurisdiction;
    - Within 14 days must apply to set aside originating process and if you fail to, conditional notice becomes unconditional notice;
        - A defendant who intends to contest the court's jurisdiction applies to the court for an order setting aside service or setting aside the originating process. The defendant also enters a conditional notice of intention to defend.
    - Do not attach a defence.
    - Form 7 and rule 144 of the UCPR
- Unconditional
    - Waives procedural irregularities regarding service and objections to jurisdiction: rule 144(6) of the UCPR.
    - *Sheldon v Brown Bayley's Steel Works Ltd*
        - A stale writ was served.
        - CH, the defendant's entry of an unconditional notice of an intention to defend waived any right the defendant had to object to the service of the stale writ.
    - Submission to the jurisdiction: *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 539
    - But does NOT confer subject-matter jurisdiction the court does not have: *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 and *Coe v Queensland Mines Ltd* (1974) 24 FLR 459 at 466-468.
        - If the court has no substantive jurisdiction, an unconditional notice of intention to defend cannot create it. By filing an unconditional notice to defend the defendant submits only to the jurisdiction of the court to decide whether it has jurisdiction.
    - Form 6 and rule 136 of the UCPR
    - Must attach a defence
- Time for entry
    - In a proceeding commenced by claim - within 28 days of service: rule 137(1).

- Where defendant served inter-state: sections 14 and 17 of the SEPA.
  - SEPA s 17 – The higher of 21 days or the limit of which the State says
- Service
  - Rule 142 of the UCPR
    - As soon as it is filed or as soon as practicable after it is filed.
  - Ordinary service required: rule 112 of the UCPR.
    - (a) leaving it with someone who is apparently an adult living at the relevant address
    - (b) if there is no-one at the relevant address — leaving it at the relevant address in a position where it is reasonably likely to come to the person's attention;
    - (c) if the relevant address is within a building or area to which the person serving the document has been denied access — leaving it at the building or area in a position where it is reasonably likely to come to the person's attention;
    - (d) posting it to the relevant address;
    - (e) if the person has given:
      - (i) a fax number under these rules — faxing the document to the person; or
      - (ii) an email address under these rules — emailing the document to the person;
    - (f) if the solicitor for the person has
      - (i) an exchange box at a document exchange — leaving the document in the exchange box or another exchange box available for documents to be transferred to the solicitor's exchange box; or
      - (ii) a fax — faxing the document to the solicitor; or
      - (iii) an email address — emailing the document to the solicitor;
    - (g) an electronic means prescribed by practice direction.

Lecture 5: Pleadings (Part 2)

Denials

- A denial is relevant in pleadings subsequent to the statement of claim. A defendant who proposes to challenge the plaintiff's allegations must, in the defence, specifically deny, or plead a non-admission, to each allegation in the statement of claim. Similarly, a plaintiff who delivers a reply must answer specifically any allegations of fact in the defence.
- R 166 is concerned with allegations of fact only.
- A denial or non-admission should be pleaded only where there is a genuine dispute or where there is a legitimate need for formal proof of an allegation. A mindless denial of all of the allegations in the opposite pleading fails to adequately define the matters in issue: UCPR r 166
- Specific denials
  - The defendant must clearly plead to the facts which are alleged in the statement of claim. The defendant may admit or deny or plead a non-admission to the allegations in the statement of claim, or allege additional facts which show the situation in a different light. Whatever course the defendant takes it must be unambiguous. If the defence is evasive or ambiguous an admission is implied, except against a defendant who is subject to a legal disability: UCPR r 166
  - A denial must answer the point of substance. The defendant has to specifically plead to the facts as they have been alleged in the statement of claim. Any facts the defendant proposes to prove at the trial must be specifically alleged in the defence.
- Ambiguous denials and implied admissions
  - The pleader must make clear what the pleading admits or denies. If a plea is ambiguous, the corresponding allegation in the preceding pleading is taken as admitted: UCPR r 166

Plea of do not admit

- The rules refer to the plea of non-admission. A defendant cannot give or call evidence in relation to a fact which was not admitted: UCPR rr 165, 166
- The rules put into formal form what is often taken as a matter of professional practice.

Denial of negative allegations

- Special considerations apply to the denial of a negative allegation. A double negative may arise from a bare denial, in which case an affirmative proposition is asserted. In ordinary English usage a double negative always imports an affirmative, but not necessarily in pleading. For pleading purposes, whether an affirmative arises depends on whether the plea is a bare denial, or whether the denial, being negative in form, carries a positive proposition. A negative plea which asserts an affirmative proposition is a negative pregnant.

Effect of a denial

- A denial, so long as it is not a negative pregnant, simply puts the plaintiff to proof of the plaintiff's case. Only where the denial implies a positive assertion does a denial in effect plead a material fact. It follows that by pleading a denial, a defendant is not permitted to adduce evidence beyond merely contradicting the plaintiff's evidence.
- In Queensland a party answering a pleading may plead a denial, a non-admission, an admission or another matter. A party who pleads a non-admission cannot give or call evidence in relation to a fact not admitted unless it relates to another part of that party's pleading: UCPR r 165.
- There is an implied admission of an allegation of fact that is not answered by a denial or non-admission, except against a party who is under a legal incapacity: UCPR r 166.
- Rule 166, in dealing with pleading denials and non-admissions, has its most significant application at the stage of the defence. The defendant may plead a denial or non-admission only if:
    - the defendant made inquiries to see whether the allegation is true;
    - the inquiries are reasonable having regard to the time for filing the defence; and,
    - the defendant remains uncertain about the truth or falsity of the allegation.
- Further, a denial or non-admission must be accompanied by a direct explanation for the defendant's belief that the allegation is untrue or cannot be admitted.
- If a denial or non-admission is unexplained or is not supported by reasonable inquiries the opposite allegation is admitted.
- A defendant who pleads a non-admission is under a continuing obligation to carry out any further inquiries that may become reasonable. The defence must be amended if the results of the inquiries make possible the admission or denial of the allegation. The plaintiff has the same obligation as to a non-admission in the reply: UCPR r 166.
- Where a denial or non-admission is pleaded unreasonably the court may order the party who pleaded it to pay any additional costs caused by the plea: UCPR r 167.

Confession and avoidance

- A defendant may intend to do more than simply deny the plaintiff's case. The defendant may intend to allege additional facts to destroy the basis of the claim. A plea of confession and avoidance is appropriate for that purpose. The defendant may both traverse and confess and avoid the same allegation, and also plead that the claim is bad in law: UCPR r 165

Amending pleadings

- The court has a general power to allow or direct a party to amend a pleading at any point in the proceeding: r 375.
- 1. Before the request for trial date is filed: Rule 378 and 379 of the UCPR
    - Another party may apply to the court seeking orders that the amendment be disallowed:

- Rule 379(1) of the UCPR – Can make an application to the court to disallow the amendment
- *Central Sawmilling No. 1*
  - The rules in relation to amendment (*Aon Risk*), apply in this case too.
  - Proposed amendment that would result in a completely new basis for recovery of money.
  - CH, amendment was NOT allowed.
  - *"….the respondent rightly puts this within the characterisation in Hall v Hall (Tasmanian Supreme Court, unreported, 3 December 1996), for example, of a ""new case" varying so substantially from what has previously been set up that it would involve investigation of matters of fact or questions of law, or both, different from what have already been raised and of which no fair warning has been given …"*
- *Re Carrington Cotton Corp*
  - Original claim sought relief from oppression under the Corporations Act. The further amended Statement of Claim made new allegation – directions had knowingly breached their fiduciary duties to the company.
  - The claim for breach of fiduciary duty is not maintainable. Alternative claim for fraud it not adequately particularised.
  - White J held that in these circumstances, the amendment should be disallowed. The original cause of action was not maintainable and the alternative claim that was maintainable on the evidence was not adequately particularised.
- An amendment can also be disallowed if there is no proper cause of action.
- If the amendment is unfair.

- 2. After request for trial date filed:
  - Rules 375 and 380 of the UCPR
  - Requires leave of the court:
    - *Qld v JL Holdings*
      - The court was more inclined to give leave to amend pleadings.
    - *Aon Risk Services Ltd v ANU*
      - The parties don't have a right to amend pleadings at any point in the proceeding – it is a discretion of the court whether or not they allow amendment.
      - It is not just about justice – it is broader than the interest of the parties. There is a public interest in the proper and efficient use of public resources.
- To add a new cause of action after expiration of the limitation period:
  - If you are statute barred at the time proceedings were commenced?
  - R 375 (2) – this section gives the court power to amend to add a new cause of action after proceedings have started
  - R 376 (4): only applies to proceedings that have become statute barred since the pleadings have commenced.
    - The court may give leave to make an amendment to include a new cause of action only if:
      - (a) the court considers it appropriate; and
      - (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.
  - Section 81 of the *Supreme Court of Queensland Act 1991* (Qld)
    - *Drainy v Barry* discussion relates to an older version of s 81.
    - s 81 now contains s 81(3). This states that the rules of the court can limit circumstances in which amendments can be made. S 81 won't extend the circumstances in which a cause of action may be added.

Reply

- Only necessary if defence has raised a new allegation of fact requiring a response from the plaintiff.

- Cannot raise a new cause of action in the reply or allege anything inconsistent with the Statement of Claim: rule 154(2) of the UCPR.
- Any allegation of fact in the last pleading is deemed to be not admitted: rule 168(1) of the UCPR.
- Effect of rule 165(2) of the UCPR – You can't lead any evidence at trial in relation to a non-admission

Counterclaim

- Separate cause of action or claim to the plaintiff's claim. It is something the defendant will consider at the time of preparing the defence.
- Cause of action must be related to the plaintiff's claim: rule 177 of the UCPR.
- Contrast with set-off:
    - A set-off is where you counter claim with your defence which will wholly or partially reduce your liability. However, it can only be pleaded if the set off relates to the statement of claim
    - Rule 173 of the UCPR;
    - Set off can only be pleaded if it relates to the facts of the plaintiff's claim;
    - *Piggott v Williams*
        - A solicitor sued his former client for fees for services the solicitor had rendered to the client.
        - The client claimed an equitable set off because the fees were only occurred as a result of the solicitor's lack of due skill and diligence. This was held to be a legitimate set off.
    - A set-off is a defence
- Who can you counterclaim against?
    - Any defendant (r 177)
    - Rule 178 of the UCPR: Can only bring a counter claim against a third party only if:
        - The plaintiff is also a party to the counter-claim; and
        - Either:
            - the defendant alleges that the other person is liable with the plaintiff for the subject matter of the counterclaim; or
            - the defendant claims against the other person relief relating to or connected with the original subject matter of the proceeding.
    - *DG Madden*: Client seeks to counter claim against the builder for breach of contract and the architect for negligence. CH, can counter claim against the second limb above.

Close of pleadings

- Rule 169 of the UCPR .
    - Reply or reply to an answer to a counter claim is served.
    - 14 days after the defence or answer to a counter claim is served.
- Effect of close of pleadings.
    - Cannot file or serve further pleadings without the permission of the court.
    - Issues between the parties are defined.

Striking out particulars

- Striking out particulars: rule 162 of the UCPR.
    - Can be used as a tactic – if it is struck out the defense becomes a bear denial which makes it a deemed admission.
- Rule 171 of the UCPR:
    - (1) This rule applies if a pleading or part of a pleading—
        - (a) discloses no reasonable cause of action or defence; or
        - (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
        - (c) is unnecessary or scandalous; or

        - (d) is frivolous or vexatious; or
        - (e) is otherwise an abuse of the process of the court.
    - (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
    - (3) On the hearing of an application under subrule (2), the court is
        - not limited to receiving evidence about the pleading.
- *Royalene Pty Ltd v Registrar of Titles*
    - *"should only be exercised … in clear cases … especially so where the case is pleaded as a circumstantial one and the inference to be drawn from evidence critical to determining liability is not common ground and the evidence is untested".*
- The court is allowed to receive evidence beyond the pleadings and can take into account the general conduct of the parties in determine whether to strike out a pleading.

Lecture 6: Joinder of Parties and Causes of Action

- Capacity to sue and be sued: Who has legal personality?
    - Individuals/natural persons
    - Corporations incorporated under the *Corporations Act 2001* (Cth)
    - Incorporated associations
    - Governments
- What about?
    - Business names – this does not create a separate legal personality
    - Unincorporated associations
    - Bankrupts
    - Minors – r 93-98
    - Adults who lack capacity – r 93-98
    - Partners – A partnership's legal personality are the people who make up the partnership, however it is possible for partnerships to sue under the firm name.

Joinder of plaintiffs/defendants (before proceedings have commenced)

- The rules allow the joinder of all parties whether as plaintiffs or defendants, who are necessary and proper parties for the final resolution of a dispute. If during the progress of a proceeding it becomes clear that additional parties must be added, or substituted for existing parties, then the rules provide the necessary machinery.
- The rules provide that all persons may join in the same proceeding as plaintiffs where they have a right arising out of the same transaction or a series of transactions, and where if separate trials were held, a common question of law or fact would arise.
- Policy objectives
    - Efficiency – The courts aren't keen to have to re-hear and re-determine litigation that relates to the same issues or series of transactions. Efficiency from the perspective of the courts and the parties.
    - Consistency – Courts are concerned that they don't have two separate tribunals considering the same factual issues, which may end up with different findings of facts.
    - Promote finality – need to resolve something once and for all.
- Rule 62(1) UCPR
    - "Each person whose presence is <u>necessary</u> to enable the court to adjudicate effectually and completely on all matters in dispute in a proceeding must be included as a party to the proceeding"

'Necessary' - plaintiff

- Have to join a plaintiff
- Rule 63 UCPR:
    - If a plaintiff or applicant seeks relief to which another person is entitled jointly with the plaintiff or applicant, all persons entitled to the relief must be parties to the proceeding.
    - A person entitled to seek relief who does not agree to be a plaintiff or applicant must be made a defendant or respondent.
- Rule 65(1) UCPR
    - In a proceeding, 2 or more persons **may** be plaintiffs or defendants or applicants or respondents if:
        - separate proceedings were brought by or against each of them and a **common question of law or fact may arise in all the proceedings**; or
        - all rights to relief sought in the proceeding (whether joint, several, or alternative) **arise out of the same "transaction" or event or series of transactions or events**.
- *Payne v Young*
- *North Pine Pty Ltd v Jezer Construction Group Pty Ltd*
    - 2 plaintiffs – both subcontractors to the same contractor. One was to provide mechanical services and the other for electrical services – completely different contracts.
    - Each plaintiff entered into a separate contract with the first defendant in relation to work the first defendant had contracted to do.
    - Both plaintiffs claimed that they were owed money under their respective contracts with the first defendant.
    - Did the matters arise out of the same transaction or series of transactions?
    - CH, the events were not arising out of the same transaction. Two discrete subcontracts by two subcontractors. Even though they shared the characteristic of being subcontracts with the same contractor they were really discrete separate subcontracts by different subcontractors with the same contract. It wasn't the same transaction and it wasn't a series of transactions – they were completely separate – only the defendant was the same person.
    - Merely having the same defendant will not give a right to join, there must be some greater similarity between the two.

'Necessary' - Defendant

- Rule 64(1): where they are jointly but not severably liable e.g. two purchasers acquiring one piece of land – both purchasers are jointly but not severably liable and so both must be joined.
- Rule 65(1) also applies (see above)
- *Parkes v Smith*
    - The plaintiff sued three defendants in a defamation case.
    - The first and second individuals were part of the Mooloolaba Game Fishing Club. The third defendant was the club itself.
    - The plaintiff resigned from the club.
    - According to the plaintiff, one of the individuals and the club published defamatory material about the plaintiff in a letter that was sent to all the members of the club and calling a special meeting of the club.
    - At a later date, at that special meeting, the first defendant spoke and made further defamatory comments about the plaintiff.
    - Could the proceeding against the first defendant and against the second and the third defendants be joined together? The claim against the second and third defendants related to the newsletter and the claim against the first defendant related to the comments made at the meeting.
    - CH, no on both limbs of 65(1). They were two separate publications of alleged defamatory material although both were said to arise from events involving the third defendant and the

resignation of the member. The claimed rights to relief did not arise out of the same transaction or event or in the same series of transactions or events.
    - BUT you can join under 65(2)(b).
- Section 6 of the *Law Reform Act* 1995: Allows you to recover from one tortfeasor if you are successful against another tortfeasor. Introduces proportionate liability in relation to certain claims
- Rule 65 (2)
    - Possible to join a defendant where there is doubt as to the defendant is or the respective amounts for which each is liable is in doubt.
    - Damage has been caused to the plaintiff by more than one person whether or not there is a factual connection between the claims apart from the involvement of the plaintiff or applicant.
- Rule 68
    - Gives the court discretion to disjoin plaintiffs or defendants. They can do this where the proceeding may delay the trial of the proceeding to prejudice a particular party or by otherwise inconvenient.

Reconstitution of Proceedings

- Under rule 69(1) - After proceedings have been commenced, the court may order:
    - the addition or substitution of a party where the party's presence before the court:
        - is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding; or
        - would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding; or
    - the removal of a party unnecessarily or improperly included in the proceeding, or a party that has ceased to be necessary or appropriate.
- *News Ltd v Australian Rugby League Football Ltd*
    - *"Will the [person's] rights in against all liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"*
    - Is anybody going to be directly affected by the order made in the action?
- *Macquarie Bank v Lin*
    - MB lend some money to a company doing property development.
    - Lin guaranteed the loan – the guarantee documents required him not to dispose of any interest in the Norman Park Property and maintain a net worth over $5M.
    - No formal security was taken over the property – It was done purely on a contractual basis.
    - Lin's parents sought a declaration that Lin held the property on trust for them.
    - It became apparent that Lin was not going to oppose that application, he accepted that he was trustee.
    - This would mean that his net worth is less than $5M.
    - MB were not keen on this court proceeding going unopposed so they sought to oppose these proceedings.
    - CH, the bank was a necessary party to these proceedings. The bank had a right to prevent Lin to dispose of the proceedings and it would be directly effected by a declaration that the property would be held on trust for Lin's parents. The banks rights would have been affected to the extent that it would lose its ability to seek an injunction.
- Rule 69(2)
    - Sets out the circumstances in which you can add a defendant outside the limitations period

Joinder of causes of Action

- Several causes of action may be joined in a single proceeding. Joining causes of action and joining parties cover some common ground. When parties are joined, different causes of action between parties cover some common ground. When parties are joined, different causes of action between the parties may be

incidentally joined. Where the rules refer to joining causes of action they mean causes of action in proceedings properly constituted as to parties.

- Rule 60
  - (1) A plaintiff or applicant may, whether seeking relief in the same or different capacities, include in the same proceeding as many causes of action as the plaintiff has against a defendant or the applicant has against a respondent.
  - (2) However, causes of action may be included in the same proceeding only if at least 1 of the following conditions is satisfied:
    - (a) if a separate proceeding were brought for each cause of action — a common question of law or fact may arise in all the proceedings;
    - (b) all rights to relief sought in the proceeding (whether joint, several or alternative) are in relation to, or arise out of, the same transaction or event or series of transactions or events; or
    - (c) the court gives leave, either before or after the start of the proceeding.

Third Party/Contribution Notices

- This is what you might consider where you cannot make a counter claim.
- Third party – cross claim against someone who is not a party to the proceedings.
- Contribution notice – issue against one of the other defendants as they are obliged to indemnify the plaintiff.
- A third party may be joined when the defendant claims against the third party:
  - a contribution or indemnity;
  - relief or a remedy connected with the original subject matter of the action and substantially the same as the relief or remedy claimed by the plaintiff; or
  - that any question relating to or connected with the original subject matter should be determined as between the plaintiff, the defendant and the third party, or any of them
- Rule 192

Representative Actions

- Sometimes there are so many parties to a proceeding all having the same interest that they are represented by one of the parties on the record. Large groups of plaintiffs or defendants – it is impractical to have them all represented.
- Rule 75
  - One or more representative plaintiff/s or representative defendant/s who take proceedings on behalf of the group who have the **same interests** as the person representing them.
  - Representative/s representing all of the persons who have the same interest and could have been parties in the proceeding.
- Rule 76
  - At any stage of a proceeding brought by or against a number of persons who have the same interest under rule 75, the court may appoint 1 or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.
- "Same interest"
  - Traditional common law position was that parties are required to have a "common interest".
  - *Markt & Co Ltd v Knight Steamship Co Ltd*
    - A ship carrying cargo sunk. Various owners of the cargo being carried tried to bring representative proceedings against the owners of the ship.
    - CH, the people didn't have the same interest as they each had separate contracts with the company. The cargo was all going to different ports – assessing damages would need to be done on an individual basis.

  - Test to determine whether persons have the "same interest" in the subject matter of the proceeding broadened by the HC in ***Carnie v Esanda Finance Corp Ltd***.
    - A number of individuals who had contracts with Esanda finance. All of these were refinanced. However, the Esanda failed to disclose when the refinanced. They all bought a claim on the same circumstances.
    - However, each individual had a different and separate contract with Esanda. Irrespective of this the HC found that they had the same interest.
    - Toohey and Gordan JJ, the fact that claims arise under different contracts does not mean that the common interest is defeated.
    - CH, that the phrase "same interest" was satisfied where there was a significant question common to all members of the class and that they stood to be equally affected by the relief being sought.
- The Federal Court, NSW, SA and VIC allow class actions to be brought in damages claims, even if individual assessments are ultimately required.
  - Need 7 or more claimants.
  - The test for them coming together is that they have to be claims arising out of the same, similar or related circumstances against the same respondents.

Protecting positions

- The courts have certain powers to protect the interests of the parties while the ultimate dispute between them is resolved through court proceedings. The objective of an exercise of these powers is to minimise harm to the parties while at the same time maintaining the integrity of court processes.

Injunctions

- Interim and interlocutory injunctions can be granted in an endeavour to preserve the status quo between the parties until the final resolution of the dispute.
- **Interim injunctions** (short period until you can have a hearing for an interlocutory injunction):
  - can be granted on an ex parte basis; and
  - Are usually granted in an emergency for a short period of time until an application for an interlocutory injunction is heard.
- **Interlocutory injunction** will normally apply until final disposition of the dispute, they tend to be opposed applications.
- The requirements for granting an interim or interlocutory injunction are:
  - There is a serious question to be tried in relation to the plaintiff's entitlement for relief;
    - Prima facie case – if the evidence remains as the plaintiff suggests there is a sufficient likelihood of success.
  - Damages would not be an adequate remedy; and
  - The balance of convenience favours the grant of an injunction.
    - Are damages an adequate remedy?
- *Australian Broadcasting Corporation v O'Neill*
- *Hyatt of Australia Limited v Coolum Resort Pty Limited and Ors*
  - The case is about an interlocutory injunction as an interim injunction had already been granted.
  - Hyatt Company managed the Coolum resort. The owner was a number of companies including Clive Palmers companies.
  - Coolum resort had been profitable for a number of users. The resort was sold at the beginning of last year to the current group of companies. They maintained the management agreement with Hyatt.
  - The companies that owned the resort claimed that Hyatt had breached the management agreement and sought to terminate the agreement.
  - On the 20th of February they took down all signs referring to the Hyatt.

- 21 Feb on an interim injunction the Hyatt got the companies to put the signs back up and prevent the termination of the agreement i.e. maintenance of the status quo.
- In early much an interlocutory injunction also went in favour of H.
- Key factors:
  - Prima facie case – none of the defendants many arguments can establish a breach of the management agreement. Rather there was a commercial decision to terminate the agreement notwithstanding a breach of contract.
  - Assessment of the balance of convenience (includes a consideration of whether damages are an adequate remedy) – CH, this did favour granting an injunction, the damage to Hyatt's reputation and brand would be extreme if the injunction was not granted. Court found that H's case was very strong.
- Administrators – they are the 3rd party, however the court found that a granting of an injunction would not inhibit them in any way.

Preserving property

- Rule 250
  - (1) The court may make an order for the inspection, detention, custody or preservation of property if—
    - the property is the subject of a proceeding or is property about which a question may arise in a proceeding; or
    - inspection of the property is necessary for deciding an issue in a proceeding.
  - (2) Subrule (1) applies whether or not the property is in the possession, custody or power of a party.
  - (3) The order may authorise a person to do any of the following:
    - enter a place or do another thing to obtain access to the property;
    - take samples of the property;
    - make observations and take photographs of the property;
    - conduct an experiment on or with the property;
    - observe a process;
    - observe or read images or information contained in the property including, for example, by playing or screening a tape, film or disk;
    - photograph or otherwise copy the property or information contained in the property.
- *Rooskov v Laconholme Pty Ltd*
  - *"The applicant for such an order should be able to show that the inspection sought is necessary in the sense that there is good reason to think that the applicant will be prevented from obtaining a just resolution of the cause or matter unless such an order is made. It follows that the inspection ordered should be no more extensive than such as is necessary in this sense. An order should not be made for an inspection which is really no more than an attempt by a plaintiff to fish for a case: Tudor Accumulator Co Ltd v China Mutual Steam Navigation Co Ltd [1930] WN 200 at 201 per Scrutton LJ".*
- Rule 251: Perishable property
- Rule 252: Orders affecting non-parties
- Rule 254: Before proceedings commence

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- Mareva orders: Order that prevents a party to dispose of assets or to stop them from removing assets out of the jurisdiction – frustrate the role of the court.
  - These orders can only be made by a court with inherent jurisdiction
  - Initially created to prevent foreign companies from moving assets out of a country. However now apply to domestic companies.
  - *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612

- Anton Pillar orders: Orders for the seizure of documents or other evidence.
    - They are made ex parte without the knowledge of the other person.
    - Arise where there are concerns that the evidence will be destroyed.
    - *Anton Piller KG v Manufacturing Processes Ltd*
        - The plaintiff planned to take action against their English agent for breach of contract. They were concerned that the defendant will destroy material documentation.
        - CH, the plaintiff can inspect, remove or make copies of the plaintiff's documents.
    - *Rank Film Distributors Ltd v Video Information Centre (a firm)*
        - The plaintiff had evidence that the defendant was making copies of films that the defendant had copyright in.
        - They got an order to go on the defendant's premises and seize the copies to prevent them from being destroyed before the case could be made.
    - Chapter 8, Part 2, Division 3 of the UCPR
    - Search Order (Anton Pillar order)
        - Rule 261A
        - Rule 261B

Security for costs

- Order that is sought by the defendant – where the defendant is concerned that the plaintiff will be unable to pay its costs if it is unsuccessful. The defendant can try to get a security for costs order.
- Rule 671

Suppression orders (non-publication orders)

- Apply more broadly not just between the two parties to the proceedings. They are directed at the media and go counter to open justice.
    - Principle of open justice - justice must not only be done it must be seen to be done.
- Model legislation for suppression and non-publication orders agreed by COAG.
- At common law:
    - There must be a necessity for a suppression order.
    - Necessity arose only in "wholly exceptional" circumstances: *John Fairfax Publications Pty Ltd v Ryde Local Court*
    - A "high level of strictness" applied in determining whether it was really necessary to exercise the power to suppress disclosure or publication: *O'Shane v Burwood Local Court (NSW)* (2007) 178 A Crim R 392 at [34]; J*ohn Fairfax Publications Pty Ltd v Ryde Local Court* at [40]-[45].
    - Prevent prejudice, protect safety, avoiding causing undue stress and embarrassment may be reasons for awarding a suppression order.
- Rinehart case
    - Application for 3/4 children trying to remove Gina as trustee for the trust.
    - She sought a suppression order under the model legislation in NSW.
    - Her basis for the suppression order was a clause in the agreement that any dispute between them would be arbitrated confidentially. Later something was added to include ' protecting safety'
    - It was not allowed initially; an interim suppression order was sought until she could have the original decision reviewed, it was granted. She then had the review of the original decision, and the review was rejected. So she got another interim suppression order whilst she appealed to the full court of the NSWSC. It was rejected. She then sought another interim suppression order to get special leave to the High Court however she did not get special leave.
    - NSWCA, not an appropriate case to issues a suppression order, there was no wholly exceptional circumstances to override the principal of open justice.

Lecture 7: Gathering information

Purpose

- The court rules provide procedures for parties to exchange documents and information are intended to serve the public interest by giving each party the opportunity to be apprised of the case to be met at the trial. The procedures provided for in the rules include:
    - Parties are required to disclose to each other what relevant documents they have in their possession.
    - A series of written questions, called interrogatories, designed to obtain admissions may be asked of opposite parties.
    - The subject matter of the proceeding is liable to be inspected and preserved, especially where it is in the custody of a party.
    - Documents and property in the possession of a non-party can be inspected.
- Collectively these procedures are called disclosure or discovery. In practice, these procedures help the parties to investigate the factual basis of the dispute. A proper appraisal of the facts by the parties should enable them to put enough material before the court for the dispute to be decided on its merits rather than on technicalities.
- The procedures may also assist the parties in reaching an informed settlement.
- Policy rationale
    - Procedural fairness/equality
    - Efficiency
    - Promote resolution other than by trial
- Solicitor's duty
    - Duty to advise client
    - Duty to court
    - UCPR, r 226

Equitable basis of discovery

- Discovery originated in England in the ecclesiastical courts and the Court of Chancery. Discovery could not be ordered by the common law courts until they were given the necessary statutory power by the common law procedure reforms in the middle of the 19th century. The basic principles of law surrounding discovery developed in the Court of Chancery.
- Sheperdson J applied the Norwich principle in Re Pyne [1997] 1 QdR 326 to order the respondent to identify the person who gave information about the defamatory contents of a circular which the respondent helped to distribute. In Computershare Ltd v Perpetual Registrars Ltd [2000] VSC 139 the court made a Norwich order to compel the defendant to give discovery of certain documents before the close of pleadings. Warren J agreed that a Norwich order is not limited to identifying a tortfeasor. It may be made to trace the disposition of funds obtained fraudulently and for other purposes. There the defendant was ordered to give discovery of documents concerning the misuse of confidential information before the plaintiff delivered its statement of claim. The discovery was ordered to identify the actual information that was misused: para 18-19.
- Rule 209(3)
- Pre-proceeding disclosure (Norwich order) - see above
- Pre-close of proceedings disclosure: r 214(2)(a)

Procedure for disclosing documents

- In Queensland, disclosure applies as of right in a proceeding commenced by claim and in a proceeding that the court ordered to proceed as if commenced by claim. The court may direct that disclosure apply in a proceeding commenced by application: r 209. Rule 210 defines disclosure as the delivery or production of documents in accordance with the rules. Disclosure applies to a document that is:
    - in a party's possession or control; and,
    - directly relevant to an allegation in issue in the pleadings or,
    - if there are no pleadings is directly relevant to an allegation in issue in the proceeding: r 211.
- Nature of duty of disclosure is **automatic** (no need to request the documents) and **ongoing**.
    - R 211(2) – disclosure continues until the matter is decided.
- A party performs the duty of disclosure by-
    - delivering a list of documents to the opposite party and, on the opposite party's request, delivering to the opposite party a copy of any document requested, subject to any claim of privilege: r 214; or
    - producing documents for inspection at a convenient time and place if it is not convenient to deliver copies of documents because of their number, size, quantity or volume or because of a requirement to produce an original document: r 216.
- Any list of documents delivered under r 214 must distinguish privileged from unprivileged documents.
- When is disclosure required? R 214(2)
    - (a) if an order for disclosure is made before the close of pleadings — the times stated in the order;
    - (b) if an application for a summary decision is made within 28 days after the close of pleadings and the proceeding is not entirely disposed of when the application is decided — within 28 days after the decision;
    - (c) if, as a result of a further pleading or amended pleading, additional documents are subject to disclosure — within 28 days after the further pleading or amended pleading is delivered;
    - (d) if the first occasion on which a document comes into the possession or under the control of the party, or is located by the party, happens after a time mentioned in paragraph (a) to (c) — within 7 days after the occasion happens;
    - (e) otherwise — within 28 days after the close of pleadings.

Relevant documents

- What must be disclosed?
    - Documents;
    - Directly relevant to a matter in issue; and
    - In the possession or control of the party.
- In Queensland, disclosure applies to a document that is directly relevant to an allegation in issue on the pleadings. A document that may lead to a train on inquiry is excluded from disclosure because of the test prescribed in r 211.
- Definition of document
    - The notion of a "document" must be seen in the context of the electronic and mechanical storage of information. Traditional writing and printing is of declining importance.
    - Acts Interpretation Act 1954 (Qld), s 36
        - (a) any paper or other material on which there is writing; and
        - (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
        - (c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).
    - Evidence Act 1977, s 115
    - Evidence Act 1995 (Cth), Dictionary, Pt 1
- Directly relevant to a matter in issue
    - Matter in issue: Rule 211(3)

        - An allegation remains in issue until it is admitted, withdrawn, struck out or otherwise disposed of.
    - Directly relevant
        - *Robson v REB Engineering Pty Ltd*:
            - "My opinion is that the word "directly" should not be taken to mean that which constitutes direct evidence as distinct from circumstantial evidence. Rather, "directly relevant" means something which tends to prove or disprove the allegation in issue."
        - *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd*
            - Directly relevant does not include documents that only lead to a chain of inquiry.
            - It must prove or disprove an allegation at issue through direct, indirect or circumstantial evidence.
        - *Storm Financial*
            - Plaintiff claiming damages for (among other things) breach of contract, negligent misstatement and misleading and deceptive conduct against the Defendant, a Bank.
            - Claims relate to loans from the Bank to the Plaintiff which were secured with a mortgage over her home and security over other assets. The funds that the plaintiff received were used to finance a number of investments with Storm Financial Ltd
            - Allegations in issue in the proceeding (i.e. alleged by the Plaintiff, denied by the Bank) included that A PARTICULAR representative of the bank:
                - failed to warn the plaintiff about the risks of taking out the loan when it had an obligation to do so;
                - made representations that the Storm advice was sound/suitable for her etc.
            - Does the Bank have to disclose documents that relate to credit risk reviews undertaken by that PARTICULAR employee at a branch of the bank other than the branch the Plaintiff held her accounts at?
            - CH, the bank had to disclose. It was held to be directly relevant. You didn't have to disclose all documents at another branch, but when they related to this particular employee, then they are documents that may prove or disprove the allegation in this proceeding.
- Documents in a party's possession or control
    - A party must disclose a document if it is in the possession or under the control of the party: UCPR, r 211
    - Possession - *Turner v Davies*: Simply means physical possession, you don't need to be the owner of the document.
    - Control – *Erskine v McDowall*: "to exercise direction over... or command over"
        - Does plaintiff have "control" of applications and other forms she had submitted to various Commonwealth agencies where:
            - She could not direct or command those agencies to provide her with copies of the documents;
            - She could make an Freedom of Information application.
        - CH, she cannot command that the Cth agencies' give her the document by right. Held that she doesn't have a duty of disclosure but other orders were made requiring her to get access to those documents.

Objections to disclosing documents

- UCPR, rr 212, 214(1)
- Privileged documents
- Documents relating solely to credit

- Copies of documents if there is no change to that copy
- R 213 – Challenging a privilege claim

Exceptions to automatic disclosure

- Documents relating only to damages: r 221
- Documents referred to in pleadings or affidavits: r 222

Powers of the court to make orders:

- Rule 223
    - Gives court power to order:
        - disclosure of a document or a class of documents;
        - a party provide an affidavit to another party attesting:
            - that a specified document or class of documents does not exist or has never existed; or
            - the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the first party
    - BUT can only make an order if:
        - (a) there are special circumstances and the interests of justice require it; or
        - (b) it appears there is an objective likelihood:
            - (i) the duty to disclose has not been complied with; or
            - (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party
- Rule 224
    - (1) The court may order a party be relieved, or relieved to a specified extent, of the duty of disclosure.
    - (2) Without limiting subrule (1), the court may, in deciding whether to make the order, have regard to the following—
        - (a) the likely time, cost and inconvenience involved in disclosing the documents or classes of documents compared with the amount involved in the proceeding;
        - (b) the relative importance of the question to which the documents or classes of documents relate;
        - (c) the probable effect on the outcome of the proceeding of disclosing or not disclosing the documents or classes of documents;
        - (d) other relevant considerations.

Consequences for failure to disclose

- Rule 225:
- (1) If a party does not disclose a document under this part, the party:
    - (a) must not tender the document, or adduce evidence of its contents, at the trial without the court's leave; and
    - (b) is liable to contempt for not disclosing the document; and
    - (c) may be ordered to pay the costs or a part of the costs of the proceeding.

Use of disclosed documents

- *Central Queensland Cement Pty Ltd v Hardy*
    - Parties effectively make an implied undertaking to use disclosed documents only for the purposes of the proper conduct of the particular proceeding that they are disclosed in.
- *McCabe v British American Tobacco*

- Using them for an ulterior or improper purpose means that the other party can get an injunction. This obligation continues beyond the end of the proceedings.
- You can get the leave of the court to use documents for an ulterior purpose.

Concerns about disclosure

- Cost
- Use as a strategy in the proceedings
- *Central Queensland Mining Supplies Pty Ltd v Columbia Steel Casting Co Inc*
  - Court acknowledged that even with the aid of judicial interpretation the term 'directly relevant' isn't exactly black and white. There remain scope for legitimate argument whether a document or a set of documents tends to prove or disprove an allegation.
- Attempts to address these problems:
  - Rule 224 of the UCPR – relief from disclosure where the time, cost and inconvenience is just too much
  - Rule 241 of the UCPR
    - If, in any case, the cost of complying with this part would be oppressive to a party, the court may order another party to pay or contribute to the cost of compliance or provide security for the cost

Interrogatories

- Interrogatories supplement disclosure of documents in seeking the admission of facts.
- Interrogatories are a series of questions designed to obtain admissions to assist the case of the interrogating party or damage the case of the party under interrogation.
- They have to be answered on oath/affirmation.
- Objectives is to obtain:
  - admissions to assist the case of the interrogating party; or
  - proof of facts that you would otherwise not be able to prove.
- Rule 229
  - (1) With the court's leave, a person may, at any time, deliver interrogatories—
    - (a) to a party to a proceeding, including a third party under chapter 6, part 6; or
    - (b) to help decide whether a person is an appropriate party to the proceeding or would be an appropriate party to a proposed proceeding — to a person who is not a party.
  - (2) The number of interrogatories may be more than 30 only if the court directs a greater number may be delivered.
- Rule 230
  - (1) Subject to an order of the court, the court may give leave to deliver interrogatories—
    - (a) on application without notice to another person; and
    - (b) only if the court is satisfied there is not likely to be available to the applicant at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory.
- Answers to interrogatories can be tendered at the trial to prove any admissions they contain. They are also useful for preparing cross-examination.

Privilege

- Legal Professional Privilege
  - Advice arm and litigation arm
  - Confidential communication between a lawyer and their client.
  - *Esso Resources Australia Ltd v Commissioner of Taxation*

        - The dominant purpose of that communication is either to provide or obtain legal advice or for use in anticipated or existing litigation.
        - 'Dominant' means the ruling, the prevailing, and most influential or paramount purpose.
- Without prejudice privilege – relates to documents that are exchange with the intention or purpose of achieving the settlement of the matter.
- Self-incrimination privilege
- Parliamentary privilege
- Public interest privilege: rule 239 of the UCPR

Expert reports

- Are excluded from any claim to privilege.
- R 212(2) – A document consisting of a statement or report of an expert is not privileged from disclosure.

Third party disclosure

- Disclosure by parties who are not parties to the proceedings.
- Equitable discovery from a non-party
- Non-party disclosure under UCPR:
    - No need for court order
    - Serve a notice of non-party disclosure
- Rule 242
    - A party (the applicant) to a proceeding may by notice of non-party disclosure require a person who is not party to the proceeding (the respondent) to produce to the applicant, within 14 days after service of the notice on the respondent, a document—
        - (a) directly relevant to an allegation in issue in the pleadings; and
        - (b) in the possession or under the control of the respondent; and
        - (c) that is a document the respondent could be required to produce at the trial of the matter.
    - (2) The applicant may not require production of a document if there is available to the applicant another reasonably simple and inexpensive way of proving the matter sought to be proved by the document.
    - (3) The respondent must comply with the notice but not before the end of 7 days after service of the notice on the respondent.
    - (4) Disclosure under this part is not an ongoing duty.

Lecture 8: Settlement and Negotiation

ADR

- Court annexed (court orders the parties to engage in some type of ADR);
    - Current legislation:
        - Part 8 of the *Supreme Court of Queensland Act 1991*
        - Part 7 of the *District Court of Queensland Act 1967*
        - Part 5 of the *Magistrates Court Act* 1921
        - Part 4 of Chapter 9 of the UCPR
    - NOTE Part 6 of the *Civil Proceedings Act 2011* (Qld) yet to commence.
    - Mediation is a process under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication – the parties choose the mediator. The court can appoint a mediator.

        - The rules require that the patties attend a court annexed mediation and the parties cannot impede the mediation.
        - Proceedings are stayed until the mediation is completed.
        - Conducted on a without prejudice basis
        - If you settle at mediation, the agreement must be reduced in writing and must be sealed and filed in court.
    - Case appraisal is a process under which a case appraiser provisionally decides a dispute.
        - A case appraiser is appointed and they make a decision in relation to the dispute. The decision is sealed and is given to the court. This is final unless the party elects to proceed to trial
        - However, this is rarely used.
- Other ADR process (parties voluntarily engage in).
    - Mediation
        - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
        - Third party has purely facilitative role i.e. no advisory role.
    - Conciliation:
        - Third party assists parties to identify issues, develop options, consider alternatives and try to reach agreement; and
        - Conciliator has an advisory (not an adjudicative) as well as a facilitative role.
    - Arbitration
        - Parties present arguments and evidence to an independent expert who makes a determination; and
        - Most commonly used in commercial, construction, labour and international trade disputes.

Offers of settlement

- Formal offers of settlement under Part 5, Chapter 9 of the UCPR ("Formal Offers of Settlement"); and
    - Policy objectives
        - Encourage realistic settlement negotiations at an early stage in the proceedings; and
        - Increase the chance of resolution of the matter other than at trial.
    - A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer to settle: rule 353(1).
    - Requirements for Formal Offers of Settlement include that it must:
        - Be served on the other party: rule 353(1) – ordinary service is sufficient
        - Be in writing: rule 353(3);
        - Contain a statement that it is made under chapter 9, Part 5 of the UCPR: rule 353(3); and
        - Set out a period the offer will remain open and that period must be at least 14 days: rule 355(1).
    - Cannot withdraw offer before period set out in offer expires without leave of the court: rule 355.
    - Offer lapses at the end of the period it is said to remain open for.
    - Offer does not lapse just because another party makes an offer: rule 357(2).
    - An offer of compromise stands as an offer made without prejudice: rule 356.
    - Any statement of fact made in offer can NOT be disclosed in a pleading or affidavit: rule 357(1).
    - Rule 357(3):
        - "*If an offer to settle is not accepted, no communication about the offer may be made to the court at the trial or hearing of the proceeding until all questions of liability and the relief to be given, other than costs, have been decided.*"
    - Rule 358: Acceptance must be in writing.
    - Mason P in *Morgan v Johnson* (1998) 44 NSWLR 578:
        - *the offeree is obliged to give serious thought to the risk involved in not accepting the offer;*

- *the prima facie consequence of non-acceptance is that the rule will be enforced against the non-accepting party; this is because, from the time of the non-acceptance of the offer, the cause of the litigation is the attitude of the party who rejected the offer;*
- *lying behind costs rule where there is an offer of compromise is the common knowledge that "litigation is inescapably chancy", the ordinary provision is expected to apply in the ordinary case: pp 581-582.*

- Rule 360 (Offer made by the plaintiff)
  - (1) If:
    - (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
    - (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
    - the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.
  - (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.
- Judgment must be equal or better than the offer to settlement
- *Davies v Fay*
  - The court confirmed in relation to the old rules, that the court has a discretion in terms of awarding costs. The court will look at the fairness of the offer.
  - You're not looking to negotiate or settle if you get the best outcome possible.
- *Castro v Hillery* [2003] 1 Qd R 651 per Williams JA at [72]:
  - *"The basic principle in my view is that the recipient of the Offer to Settle must have an informed opportunity to assess the chances of either side doing better than the offer. Further that issue must be decided on material disclosed in the proceedings; it is the claim as made in the proceedings which is under consideration."*
  - Plaintiff makes an offer to settle
  - The offer is rejected by the defendant. A couple of months later, significant additional damage claims were added by the plaintiff that made the claim more than double the amount of the offer to settle.
  - The plaintiff is successful in obtaining a judgment against the defendant for more than the offer of the settlement. Can the defendant show circumstances warrant a costs order other than indemnity costs is appropriate?
  - CH, the plaintiff was only entitled to standard costs. Indemnity costs were not awarded.
- Rule 361 (Defendant marks an offer to settle)
  - (1) This rule applies if—
    - (a) the defendant makes an offer to settle that is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle; and
    - (b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
  - (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—
    - (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer to settle; and
    - (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer to settle.
  - (3) However, if the defendant's offer to settle is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders—

- (a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and
- (b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis.

▪ (4) If the defendant makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.

Contractual offers of settlement.

- Calderbank offers must:
  - Be marked "without prejudice save as to costs" or contain words to that effect;
  - Set a time period that the offer will remain open for; and
  - Clear and precise.
- Differences
  - Under UCPR, first there is an primary obligation of the court to make an order under r 360 or 361 unless it is proven that they should make an alternative order.
  - Under a Calderbank order, the court has a discretion as to what they do.
  - Under the UCPR, if you satisfy the requirements of 360 or 361, it is the party who receives the offer who has to convince the court not to make the order that is required by the rule.
  - Under Calderbank offers, it is up to the party that wants to rely on the offer as to why it should have certain cost orders.

Mechanisms for enforcing compromise;

- Contractually binding arrangement
- Consent judgment (best way for the parties to protect their positions, equivalent of a judgment after a hearing)

Lawyers' obligations; and

- Section 312 of the *Legal Profession Act 2007* (Qld):
- *(1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, before the settlement is executed, the law practice must disclose the following to the client:*
  - *(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled, including any legal costs of another party that the client is to pay;*
  - *(b) a reasonable estimate of any contributions towards those costs likely to be received from another party*.
- Rule 22.1 of the Australian Solicitors Conduct Rule (comes into force in Qld on 1 June 2012):
  - *"A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise)."*

Lecture 9: Summary Disposal and Discontinuance of Proceedings

Judgment where failure to file notice of intention to defend and/or defence

- Defendant fails to file:
  - notice of intention to defend and defence within 28 days from service (as required by rule 137): rule 281(1); or (28 days)
  - defence within 7 days of a conditional notice of intention to defend becoming unconditional (as required by rule 144(5)): rule 281(2).
- Service
  - Need to prove valid service of the claim. It must comply with the service rules.

    - Rule 282
    - Note requirements for affidavit of service in rule 120 – these rules don't explicitly require an affidavit however, rule 120 requires this.
- Type of claim
    - Claim for:
        - Debt or liquidated demand (with or without interest);
            - A claim that can be ascertained by the court by the use of some kind of calculation or fixed by a scale of charges or other positive data.
            - In *Spain v Union Steamship Co of New Zealand Ltd*: "*... whenever the amount to which the plaintiff is entitled ... can be ascertained by calculation or fixed by any scale of charges, or other positive data, it is ... liquidated*."
            - Rule 283
                - Apply to the court for the amount you claim together with interest.
                - 283 (10) – merits of the claim do not need to be considered.
        - Unliquidated damages (interlocutory judgment);
            - Unliquidated damages – the court must assess these – they must take in facts and then make a determination by applying relevant case law and/or legislation.
            - Rule 284
                - Can apply to the court to enter judgment for the assessment of damages. An interlocutory judgment is given with the assessment of damages to be heard.
            - Court assesses the damages at a hearing:
                - Defendant MUST be given notice of the hearing; and
                - At hearing the plaintiff is required to establish the extent of the damages sustained: *Ex Parte Brit*
        - The return of goods; or
            - Rule 285
            - Claim in detinue – seeking the return of goods or to be paid the market value.
        - The recovery of land if equitable relief is not involved; or
            - Common law proceeding for recovery of possession of land
            - Rule 286
            - NOTE rule 286(4): "plaintiff not entitled to judgment under this rule for claims for delivery of possession of land under a mortgage"
        - Other cases
            - Rule 288
                - (1) This rule applies if a defendant is in default and the plaintiff is not entitled to apply for judgment under rule 283, 284, 285 or 286.
                - (2) The plaintiff may apply to the court for a judgment.
                - (3) On the application, the court may give the judgment it considers is justified on the pleadings even if the judgment was not claimed.

Effect of a default judgment

- *Kok Hoong v Leong Cheong Kweng Mines Ltd*
    - In effect a default judgement creates an estoppel in the same way as a judgment given at trial.
    - It is only a final judgment until the court decides to set it aside – it lacks the certainty of a judgment after trial.
    - Lacks the costs of a judgment after trial.

Setting aside default judgment

- Rule 290: *"The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."*
- A court has not assessed a case on its merits.
- Judgment entered regularly in accordance with the UCPR versus a judgment entered irregularly.
    - Judgment entered irregularly (Irregularity in the process of reaching the proceedings – inadequate service, judgment is for an amount not claimed in the statement of claim, judgment claimed is for a debt or liquidated demand when in fact it is unliquidated so damages should have been assessed by the courts, apply for default judgment within 28 days i.e. don't wait for the full 28 day period).
        - *Cusack v De Angelis*: "…do whatever is necessary to achieve justice between the parties and to avoid unnecessary delay and expense…[in setting aside default judgments]"
            - CoA said that the court has the power to amend irregular entered judgments under rule 290.
            - When they are looking at applications to set aside default judgment, they will do whatever is necessary to achieve justice between the parties and to avoid unnecessary delay and expense.
            - The defendant had guaranteed a loan that the plaintiff had made, to a company to the defendant effectively controlled. The company defaulted on the loan and the plaintiff tried to call in the guarantee. The defendant refused to pay under the guarantee.
            - Defendant didn't enter a notice of intention to defend or defence. The plaintiff obtained default judgment – but this included an interest rate of 40%.
            - The plaintiff has gone to enforce the judgment. The defendant tried to set aside the judgment.
            - He argued that the judgment should be set aside for two reasons; first, he had the defense of misrepresentation, secondly, it is an irregular judgment - the contract only allows for 30% interest not 40% interest.
            - Defendant's claim was found to be untenable. Should the whole judgment be set aside because the interest was wrong? The judge decided to amend the judgment to correct the interest rate.
            - CoA said that the court can do whatever is necessary to achieve justice between the parties and that the original decision was correct.
    - Judgment entered regularly.
        - Court has discretion
        - Relevant considerations are-
            - the defendant's reason for failing to appear or plead;
            - whether there has been undue delay in applying to set aside the judgment; and
            - whether the plaintiff would be prejudiced in such a way that could not be compensated in costs.
        - Recent case, the court has said the defendant needs a compelling reason for the failure to appear and that it has a plausible defence.

Preliminary determination of a point of law

- Rules 482-486
- Pre-trial determination of question of law
- Court has a discretion as to whether to consider question of law separately
- Rule 484: *"If a question is decided under this part, the court may, subject to rule 475, make the order, grant the relief and give the directions that the nature of the case requires."*
- Rule 485:

- *"The court may, in relation to a decision of a question under this part, as the nature of the case requires—*
  - *(a) dismiss the proceeding or the whole or part of a claim for relief in the proceeding; or*
  - *(b) give judgment, including a declaratory judgment; or*
  - *(c) make another order."*

Inherent jurisdiction to strike out

- Defendant may fall into default otherwise than by failing to file a notice of intention to defend.
- The inherent jurisdiction ensures that the courts processes are not abused and the interests of justice are promoted. The court may use this jurisdiction where the defendant engages in groundless or vexatious proceedings that amount to an abuse of process: *Metropolitan Bank v Pooley* (1885) 10 AC 210 at 220-221 approved in *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27

Judgment on admissions

- Rule 190: Where the defendant makes admissions in its defence that means that the substance of its claim is entirely admitted.
- (2) The court may give judgment or make another order even though other questions in the proceeding have not been decided.

Discontinuance

- Settlement
  - Rule 308A
    - (1) This rule applies if a proceeding is settled, whether or not a request for trial date has been filed.
    - (2) Each party must immediately give the registrar written notice that the proceeding has been settled.
- Costs
  - Rule 307
    - (1) A party who discontinues or withdraws is liable to pay—
      - (a) the costs of the party to whom the discontinuance or withdrawal relates up to the discontinuance or withdrawal; and
      - (b) the costs of another party or parties caused by the discontinuance or withdrawal.
    - (2) If a party discontinues or withdraws with the court's leave, the court may make the order for costs it considers appropriate.
    -
- Discontinuance by the plaintiff
  - Rule 304
    - (1) A plaintiff or applicant may discontinue a proceeding or withdraw part of it before being served with—
      - (a) for a proceeding started by claim — the first defence of any defandant; or
      - (b) for a proceeding started by application — the first affidavit in reply from a respondent.
    - (2) However, after being served with the first defence or first affidavit in reply, a plaintiff or applicant may discontinue a proceeding or withdraw part of it only with the court's leave or the consent of the other parties.
- Discontinuance by the defendant
  - Rule 306

        - "A party may withdraw the party's notice of intention to defend at any time with the court's leave or the consent of the other parties".
    - Rule 308(2)
        - "A defendant or respondent may withdraw all or part of the defence."

Summary judgment

- An application for summary judgment can be made by a plaintiff or a defendant after the filing of a notice of intention to defend.

- Pursuant to rule 292 of the UCPR, the court may give summary judgment for a plaintiff if the court is satisfied that-
    - the defendant has no real prospect of successfully defending all or part of the plaintiff's claim; and
    - there is no need for a trial of the claim or part of the claim.
- The court may give summary judgment for all or part of the plaintiff's claim and make any other appropriate order

- Under rule 293 of the UCPR, the court may give judgment for the defendant if-
    - the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim; and,
    - there is no need for a trial of the claim or part of the claim.
- The court may give judgment summarily for the defendant against the plaintiff for all or part of the plaintiff's claim or make any other appropriate order.

- 'No real prospect of success'
    - Principles relating to summary judgment
    - In *Spencer v The Commonwealth* :
        - Ordinarily a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.
    - In *Jessup*, Chesterman JA said consistent with that approach:
        - …it is only where a trial can be seen to be pointless that judgment should be entered summarily. If it might succeed, if there is a possibility of success, it cannot be just, although it may be expeditious, to enter summary judgment.
    - What is meant by "no real prospect"? In *Swain v Hillman*, which was concerned with a provision in identical terms to r 292, Lord Woolf MR said:
        - …the court now has a very salutary power, both to be exercised in a claimant's favour or…a defendant's favour. It enables the court to dispose summarily of both claims [and] defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.
    - In *Queensland University of Technology v Project Constructions (Aust) Pty Ltd*, Holmes J said:
        - "The more appropriate inquiry is in terms of the Rule itself: that is, whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that: 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.'"
    - Courts have considered whether this means that a plaintiff must demonstrate that the defence is "bound to fail", or "cannot succeed" or "has no prospects of success". But the Court of Appeal has

recently restated, in *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd*, that the language of r 292 is clear and unambiguous and must be considered in light of the overriding purpose of the UCPR to facilitate the just and expeditious resolution of the matter in dispute and best understood, in the time honoured way, on a case by case basis, informed by judgment about the relevant legal principles…

Dismissal for want of prosecution

- A defendant may make an application to the court seeking dismissal of the plaintiff's claim for want of prosecution. The Supreme Court has an inherent power to dismiss a proceeding for want of prosecution. The exercise of the power is discretionary.
- Applies to actions commenced by claim or by application
- Does not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible
- Empowers the court to impose upon plaintiff the ultimate punishment where the plaintiff has failed to prosecute an action according to the rules of court or has failed to comply with orders made. Brings the proceedings to an end with the consequence that the parties' rights and obligations are permanently affected
- Rule 280 does not exclude the inherent jurisdiction of the court to dismiss for want of prosecution
- Rule 280
    - Gives a right to dismiss – continues the inherent jurisdiction of the court
    - 280(3) – an order may only be set aside on appeal.
- *Cooper v HopgoodGanim*
    - The English test is no longer to be applied. The parties must focus on whether the delay was of such a character to bring such an action to an end. The court has an unfettered discretion to determine whether or not to end the proceedings.
- *Quinlan v Rothwell* – 10 year delay – witnesses had died. The plaintiff had complied with the most recent order of the court for disclosure. The trial judge dismissed this incorrectly under r 280. However, the appeal court, held that he was right to do so under his inherent jurisdiction.
- Matters required to be satisfied:
    - 1. That there is a rule which required the plaintiff or applicant to take a step within a stated time or an order has been made requiring the plaintiff or applicant to comply with it within a stated time: r 280(1)(a)
    - 2. The "step" must be one which carries the proceedings forward and is intended to continue the litigation. The step in the action must have an effect on the opposite party.
    - 3. Alternatively, the jurisdiction under the rule will be enlivened when there has been a failure by the plaintiff or applicant to do what is required by a an order of the court within the time required by the order: r 280(1)(a)(b).
- Discretionary matters
    - how long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced;
    - how long ago the litigation was commenced or causes of action were added;
    - whether or not the limitation period has passed;
    - what prospects the plaintiff has of success in the action;
    - whether or not there has been disobedience of Court orders or directions;
    - whether or not the litigation has been characterised by periods of delay;
    - whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant;
    - whether or not the impecuniosity of the plaintiff has been responsible for the pace of the litigation and whether the defendant is responsible for the plaintiff's impecuniosity;

- whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim;
- how far the litigation has progressed;
- whether or not the delay has been caused by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be.
- whether there is a satisfactory explanation for the delay;
- whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial.

Lecture 10: Evidence and Trial

Evidence

- Three parts to a witness's evidence. First is the evidence in chief, then there is cross-examination (other parties representatives question the witness), finally there is re-examination (the party that called the witness has to opportunity to ask clarifying questions that arise out of the cross-examination).

General mode of giving evidence

- UCPR, r 390
  - "Subject to these rules or a direction by the court:
    - (a) evidence at the trial of a proceeding started by claim may only be given orally; and
    - (b) evidence in a proceeding started by application may only be given by affidavit."
- Applies to proceedings commenced by claim or application, including interlocutory applications.
- Application is subject to:
  - the remainder of the UCPR; and
  - specific direction by the Court.
- Rule 367
  - Rule 367(3)(d) empowers a court to give a direction in relation to a trial or other hearing in a proceeding that evidence be given by way of affidavit, orally or in some other form.
  - In deciding whether to exercise its discretion under rule 367(3)(d):
    - the interests of justice are paramount: rule 367(2);
    - there are a number of other factors the court may take into account, including those listed in rule 367(4).
- Supervised Case list, Supreme Court Practice Direction 6 of 2000

Evidence in applications including interlocutory applications

- Evidence to be given by way of affidavit: rule 390(b) of the UCPR.
- Rule 430 of the UCPR
  - "(1) Except if these rules provide otherwise, an affidavit must be confined to the evidence the person making it could give if giving evidence orally.
  - (2) However, an affidavit for use in an application because of default or otherwise for relief, other than final relief, may contain statements based on information and belief if the person making it states the sources of the information and the grounds for the belief."
- An affidavit can be filed and served under the UCPR but its contents do not become evidence until it is tendered and admitted as evidence in court.
- Court can order that the deponent of an affidavit be examined and cross-examined: rule 439 of the UCPR.
- Court has some power to control contents of affidavit:
  - Can order contents be limited to matters referred to in rule 430 of the UCPR; and

- Rule 440 of the UCPR
  - "If there is scandalous or oppressive matter in an affidavit, the court may order that:
    - the affidavit be removed from the file; or
    - the affidavit be removed from the file and destroyed; or
    - the scandalous or oppressive matter in the affidavit be struck out."

Evidence at trial of a matter commenced by a claim

- General rule is that evidence is given orally: rule 390(a) of the UCPR.
- However, rule 367(3)(d) of the UCPR gives the court a discretion to order evidence be given other than orally at trial. Key test is will it enhance the interests of justice?
- Justice Fryberg in *The Presbyterian Church of Queensland v Hodson*:
  - "The ordinary course of trial is for evidence to be given viva voce. To give evidence in chief on affidavit is a luxury ordinarily reserved for commercial cases where the perception seems to be that cost does not matter. The reality is that giving evidence in chief by affidavit usually causes increased cost in overall terms."
- Ensuring attendance of witness at court
  - Failure to comply with a subpoena is a contempt of court: rule 422 of the UCPR.
  - Can serve a subpoena on a party or a non-party.
  - Pursuant to rule 415(1) of the UCPR, a subpoena can require a person to:
    - Attend to give evidence; and/or
    - Attend to produce documents.
- Process of subpoena
  - File a request for subpoena with copies of subpoena you want the court to issue attached.
  - Serve the subpoena: rule 421 of the UCPR.
  - Any objection to subpoena raised.
  - Unless objection to subpoena upheld, witness attends court and/or subpoenaed documents are produced to court.
  - Rule 415(2)
- Plans, photographs, video or audio recordings: r 393

Trial

How does a proceeding commenced by claim end up at trial?

- Can be initiated by the court setting the matter down for trial or by the parties seeking to have it set down for trial.
- Request for trial date: rule 467 of the UCPR.
- NOTE effect of rule 470 of the UCPR.

Mode of trial

- Can be trial by:
- Judge sitting alone; or
- Judge and jury:
  - Jury reaches a verdict in relation to questions of fact; and
  - Judge determines questions of law.
- Trial by jury
  - Pursuant to rule 472 of the UCPR, can be elected by a party:
    - Plaintiff in Statement of Claim; or

        - Defendant in Defence.
    - If party fails to elect trial by jury earlier, can apply for court to order trial by jury under rule 475(1).
    - At order of court under rule 475(2): "If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury".
    - Legislation can specifically exclude jury trials in certain cases. e.g. Section 73 of the Civil Liability Act 2003
    - Where parties have elected trial by jury, court may order no jury trial in certain circumstances: rule 474 of the UCPR:
        - "The court may order a trial without a jury if—
            - (a) the trial requires a prolonged examination of records; or
            - (b) involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury."
    - Section 283(2)(g) of the Supreme Court Act 1995 gives a judge a discretion to order that the proceeding be determined by judge alone UNLESS both parties demand a jury trial. (commercial cause)
- Supreme or District Court judge can appoint a special referee to determine; or provide a written opinion to the court, in relation to an ISSUE OF FACT in a proceeding: rules 501-505 of the UCPR.

Separate determination of a question of law or fact

- Rule 483
- (1) The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.
- (2) The Supreme Court, other than the Court of Appeal, may also state a case for the opinion of the Court of Appeal."

Procedure at trial

- Failure to appear
    - Defendant fails to appear: rule 476(1) of the UCPR.
    - Plaintiff fails to appear: rule 476(2)
        - "…defendant is entitled to dismissal of the plaintiff's claim and the defendant may call evidence necessary to establish an entitlement to judgment under a counterclaim against the plaintiff, in the way the court directs".
    - Court has discretion to set aside judgment obtained by default of appearance at trial. The matters relevant to the exercise of the court's discretion include:
        - (a) whether or not the non-appearing party has a satisfactory explanation for the failure to appear at the trial;
        - (b) whether or not any delay in the bringing of the application to set aside the judgment is such as to prevent the exercise of the discretion;
        - (c) whether or not the non-appearing party has any merits to their case; and
        - (d) whether or not the party who has obtained judgment will suffer irreparable harm or prejudice if the judgment were to be set aside.
- Trial process – jury trials
    - Jury verdict versus court judgment.
    - Rule 659 of the UCPR: "Final relief granted in a proceeding started by claim is granted by giving a judgment setting out the entitlement of a party to payment of money or another form of final relief."
- Judgment obtained by fraud
    - As a general rule, judgment is final.
    - This is not an appeal against the decision.

- Limited jurisdiction to set aside judgment because of fraud:
  - Equitable;
  - Rule 667(2)(b) of the UCPR.

- Slip rule
  - Inherent jurisdiction (equitable) to rectify judgment where it does not reflect the court's intention: *DJL v Central Authority*.
    - NOTE: also covered in rule 667(d) of the UCPR.
  - Rule 388 of the UCPR:
    - "(1) This rule applies if—
      - (a) there is a clerical mistake in an order or certificate of the court or an error in a record of an order or a certificate of the court; and
      - (b) the mistake or error resulted from an accidental slip or omission.
    - (2) The court, on application by a party or on its own initiative, may at any time correct the mistake or error."

Lecture 11: Costs and Appeals

Costs

1. Terminology;
   - Solicitor and own client costs; (all the legal costs that a client is legally required to pay their solicitor – professional fees and disbursements, expert opinion costs, process servers – right to payment comes through contract)
   - Standard basis costs; and (party and party costs – legal costs that the court orders that another party or a non-party pay to proceedings – the standard basis is the usual costs order)
   - Indemnity costs. (the court will award on a special basis to a particular party – they are not a full indemnity usually 70-80% of the costs.)
2. Solicitor's costs agreements with clients;
   - Must be in writing or evidenced by writing: section 322(2) of the *Legal Profession Act* 2007 (Qld) (LPA).
   - Conditional costs agreement: section 300 of the LPA:
     - *"means a costs agreement that provides that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, as mentioned in section 323, but does not include a costs agreement to the extent to which section 325(1) applies"*. – no win no fee or no win partial fee agreement. Need to clearly define what a successful outcome is.
     - Permissible but must comply with section 323 of the LPA.
   - Uplift fee defined in section 300 of the LPA: - a fee that says that if you are successful then you get an extra percentage of costs – it cannot be more than 20% of costs including disbursements
     - *"additional legal costs, excluding disbursements, payable under a costs agreement on the successful outcome of the matter to which the agreement relates"*.
     - - must comply with section 324(4) of the LPA.
   - Cannot include a contingency fee: section 325(1): - a fee that you get a percentage of whatever the client gets.
     - *"A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates."*
   - Can be enforced as a contract: section 326 of the LPA.

- Costs agreement that fails to comply with Division 5 of Part 3.4 of Chapter 3 of the LPA is void: section 327 of the LPA. This means that you are limited to scale costs – the UCPR defines the amount depending on the court in which the action takes place. It is significantly less than what most firms usually get through an agreement.
- Client can apply to QCAT or the Supreme Court to set aside the costs agreement on the basis it is not fair and reasonable: section 328(1) of the LPA.
- Even if valid, enforceable costs agreement, client still retains the right to have costs assessed by court or costs assessor: section 335 of the LPA.

3. Court jurisdiction in relation to costs;
    - The courts power to require a party (or non-party) to pay another party some costs.
    - Rule 680 of the UCPR:
        - "*A party to a proceeding can not recover any costs of the proceeding from another party other than under these rules or an order of the court.*" – an order given pursuant to other legislation that also provide for costs order is also an 'order of the court'
    - Rule 666 of the UCPR.
        - Parties can agree by consent which costs are going to be the subject of assessment.
4. Costs between parties, including:
    - General principle: costs follow the event;
        - The party that was successful has a costs order made in their favour by the court. To be an 'event' it needs to be a court order or a court judgment or interlocutory application or discontinuance of proceedings.
        - Rule 681 of the UCPR:
            - "*(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.*
            - *(2) Subrule (1) applies unless these rules provide otherwise."*
            - The court has a complete discretion in relation to awarding costs.
        - "Costs of the proceeding" mean costs of all the issues in the proceeding and includes:
            - (a) costs ordered to be costs of the proceeding; and
              (b) costs of complying with the necessary steps before starting the proceeding; and
              (c) costs incurred before or after the start of the proceeding for successful or unsuccessful negotiations for settlement of the dispute.
        - *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97 per McHugh J:
            - *"The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. (Latoudis (1990) 170 CLR 534 at 543 per Mason CJ; at 562–563 per Toohey J; at 566–567 per McHugh J; Cachia v Hanes (1994) 179 CLR 403 at 410 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ). If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of unsuccessful litigation."*
    - Depriving a successful party of costs;
        - There must be very special or rare circumstances that prevent a party from getting costs.
        - Court discretion: rule 681(1) of the UCPR.
        - *Verna Trading Pty Ltd v New India Assurance Co Ltd* [1991] 1 VR 129.
            - V took out insurance in relation to certain goods that were transported by C with New India.

- It covered the goods from the time they left the warehouse until the goods reached V's warehouse or a warehouse elected by V that was not in the ordinary course of transit.
- The goods arrived in Melbourne as required in the warehouse. However V did not take possession for a month, they were left in the stevedoring company's warehouse
- Finally, it was discovered that the goods were stolen. They brought an insurance claim.
- V demanded cover under the insurance – NI didn't respond to their claims.
- V sued NI, NI denied that the goods were insured, denied that V had suffered any loss and that the alleged loss was covered by the insurance policy.
- On the first day of proceedings, NI were given leave to amend their defence. The policy did not cover the loss could be added.
- It wasn't until the last day of the trial was the argument fully developed. They argued that the temporary holding was outside the time specified in the contract. As soon as the goods arrived in the storage the policy ended.
- The court accepted NI's argument in terms of the policy. No coverage in the warehouse. V couldn't prove that the goods were stolen while in transit and so were not entitled to coverage.
- Costs was an issue – court held that this was an exceptional circumstances, costs shouldn't follow the event. V commenced proceedings because NI didn't respond, also during the proceedings NI did not articulate their argument clearly in the proceedings. NI was ordered to pay V's solicitor client costs up to and including the first day of trial when they amended their pleading.

- Rule 697 of the UCPR (incorrectly starting proceedings in a higher court than you are supposed to)
  - **"***(1) Subrule (2) applies if the relief obtained by a plaintiff in a proceeding in the Supreme Court or District Court is a judgment that, when the proceeding began, could have been given in a Magistrates Court.*
  - *(2) The costs the plaintiff may recover must be assessed as if the proceeding had been started in the Magistrates Court, unless the court orders otherwise.*
  - *(3) Subrule (4) applies if the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, but not a Magistrates Court.*
  - *(4) The costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Court, unless the court orders otherwise."*

- Multiple parties or issues;
  - Rule 684 of the UCPR
    - *"(1) The court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding.*
    - *(2) For subrule (1), the court may declare what percentage of the costs of the proceeding is attributable to the question or part of the proceeding to which the order relates."*
  - Gould *v Vaggelas* (1984) 157 CLR 215 at 230 per Gibbs CJ:
    - *"…. mere fact that the joinder of two defendants was reasonable does not mean that the unsuccessful defendant should be ordered to pay, directly or indirectly, the costs of the successful defendant. Obviously a judge should make a Bullock order only if he considers it just that the costs of the successful defendant should be borne by the unsuccessful defendant, and, if nothing that the unsuccessful defendant has said or done has led the plaintiff to sue the other defendant, who*

ultimately was held not to be liable, it is difficult to see any reason why the unsuccessful defendant should be required to pay for the plaintiff's error or overcaution."

- If you are successful against one party and unsuccessful against another, you get costs from the first and have to pay costs to the other.
- Bullock Order – plaintiff must pay the successful defendant's costs and the unsuccessful defendant must pay the plaintiff's costs.
- Sanderson Order – the unsuccessful defendant is ordered to pay the successful defendant directly – the plaintiff isn't in the picture.
- If the causes of action are related and there was some reason that made joinder proper then costs aren't likely to be awarded?

5. Costs against non-parties;
    - Only in exceptional circumstances. This is usually where the non-party is so intrinsically linked to the proceedings – e.g. liquidators of a company are so intrinsically connected.
    - No specific order in the rules. Need to look to another specific statutory power.
    - Litigation funders? They are not contrary to public interest
6. Types of costs order;
    - Standard Costs
        - Unless there is another order, there will always be standard costs.
        - Rule 702 of the UCPR:
            - "*(1) Unless these rules or an order of the court provides otherwise, a costs assessor must assess costs on the standard basis.*
            - *(2) When assessing costs on the standard basis, a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed."*
        - If you are awarded costs, you can reach a settlement amount with the other aside, however they will only do this if you assess your costs by using a costs assessor. If you don't reach an agreement then you need to go the court to determine the costs using a costs assessor.
        - Only entitled to what is necessary or proper costs.
        - McGill DCJ in *Hennessey Glass and Aluminium Pty Ltd v Watpac Australia Pty Ltd* (2007) 69 ATR 374; [2007] QDC 057 at [24]: *"Costs are 'necessary' if the litigation could not have been carried on reasonably without them. Costs are 'proper' if it was reasonable for a client with a competent solicitor to have incurred those costs in carrying on the litigation."*\
        - Get no more that the scales in schedules
        - Not an untenable argument, no delay to you argument, and a defendant or a plaintiff can file a rule 444 or 445 letter.
    - Indemnity Costs
        - Make a formal offer for settlement under the rules, and you end up with an order that exceeds that offer, you may get indemnity costs.
        - Vexatious proceedings or proceedings commenced with an ulterior motive also result in this order.
        - Rule 703 of the UCPR:
            - **"***(1) The court may order costs to be assessed on the indemnity basis.*
            - *(3) When assessing costs on the indemnity basis, a costs assessor must allow all costs reasonably incurred and of a reasonable amount, having regard to—*
            - *(a) the scale of fees prescribed for the court; and*
            - *(b) any costs agreement between the party to whom the costs are payable and the party's solicitor; and*

- *(c) charges ordinarily payable by a client to a solicitor for the work."*

- Another order
  - Rule 687 of the UCPR:
    - *"(1) If, under these rules or an order of the court, a party is entitled to costs, the costs are to be assessed costs.*
    - *(2) However, instead of assessed costs, the court may order a party to pay to another party—*
    - *(a) a specified part or percentage of assessed costs; or*
    - *(b) assessed costs to or from a specified stage of the proceeding; or*
    - *(c)* ***an amount for costs fixed by the court****; or*
    - *(d) an amount for costs to be decided in the way the court directs."*
  - The court can order a lump sum amount of costs or some way other than standard costs or indemnity costs.

7. Assessing costs; and
   - Rules 705-743R of the UCPR.
8. Misconduct of litigation.
   - Conflicting instructions against a duty of a solicitor to a court and their client.
   - An order against the solicitor for misconduct.
   - The court has a broad discretion for this order for all or part of their costs.
   - Can require a non-party (solicitor) to make a payment to a party.
   - Rule 690 of the UCPR:
     - *"The court may order a lawyer to repay to the lawyer's client all or part of any costs ordered to be paid by the client to another party if the party incurred the costs because of the lawyer's delay, misconduct or negligence."*
   - Solicitor allowed a client to proceed with a cause of action even though there was no likelihood of success. The solicitors had an ulterior motive to delay payment to the other party under a contract. The court ordered the solicitor to pay.
   - The solicitor made an elaborate constitutional argument not for the basis of success but to delay the court process, they were ordered to pay costs.

Appeals

1. Basis of appeal jurisdiction;
   - Statutory jurisdiction ONLY. No common law right of appeal.
   - Asking (usually a higher court) to reverse, set aside or otherwise vary, a judgment or other order.
2. Types of Appeal;
   - An appeal from a civil trial usually takes the form of:
     - an appeal in the strict sense; (They cannot consider new evidence, they must consider the law at the time the original decision was made, however they can consider a new legal argument not raised at the first instance if it's based on the same facts)
       1. Appeals to High Court proceed by way of an appeal in the strict sense.
       2. Appeal court only decides whether the judgment at first instance **was correct when it was decided.**
     - an appeal by way of re-hearing. (They can consider new evidence, they must consider the law at the time the time of the appeal, and they can consider a new legal argument. They must still show some error at the first instance.)
       1. Appeals to Full Court of the Federal Court and the Qld Court of Appeal proceed by way of rehearing.

2. Appeal court re-determines the legal rights and obligations of the parties **at the date of the rehearing**.

3. Queensland; and
   - Rule 765 UCPR
     - *"(1) An appeal to the Court of Appeal under this chapter is an appeal by way of rehearing.*
     - *(2) However, an appeal from a decision, other than a final decision in a proceeding, or about the amount of damages or compensation awarded by a court is brought by way of an appeal.*
     - *(3) An application for a new trial is brought by way of an appeal.*
     - *(4) Despite subrules (2) and (3) but subject to the Act authorising the appeal, the Court of Appeal may hear an appeal from a decision mentioned in subrule (2) or an application for a new trial by way of rehearing if the Court of Appeal is satisfied it is in the interests of justice to proceed by way of rehearing."*
   - Rule 766
     - *"(1) The Court of Appeal—*
     - *(a) has all the powers and duties of the court that made the decision appealed from; and*
     - *(b) may draw inferences of fact, not inconsistent with the findings of the jury (if any), and may make any order the nature of the case requires; and*
     - *(c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way; and*
     - *(d) may make the order as to the whole or part of the costs of an appeal it considers appropriate.*
     - *(2) For subrule (1)(c), further evidence may be given without special leave, unless the appeal is from a final judgment, and in any case as to matters that have happened after the date of the decision appealed against."*
     - *(4) On an appeal, the powers of the Court of Appeal are not limited because of an order made on an application in a proceeding from which there has been no appeal.*
     - *(5) Also, on hearing an application for a new trial or to set aside the verdict or finding of a jury, the Court of Appeal may, if satisfied it has before it all the materials necessary for finally determining any or all of the questions in dispute or for awarding any relief sought, give final judgment in the matter, and may for that purpose draw any inference of fact not inconsistent with any findings of the jury.*
   - Rule 770
     - Talks about when the court will exercise a new trial. The CoA remits the matter back to the trial division of the Supreme Court for reconsideration.
     - There must be some substantial injustice that cannot be solved by rehearing.
     - Miscarriage of the trial. Where the verdict was reached by the jury was against the evidence reached by the jury.

4. Procedure for appeal.
   - Rules 746-760 of the UCPR.
   - Need to make an application to the court for appeal. This needs to be filed with the court registry. It must also be served. There are time restrictions r 748 – 28 days after the original decision.
   - Rule 746(1) of the UCPR:
     - *"An appeal is started, or an application for a new trial is made, by filing a notice of appeal with the registrar of the Supreme Court at Brisbane."*
   - Rule 748 of the UCPR:
     - *"A notice of appeal must, unless the Court of Appeal orders otherwise—*
     - *(a) be filed within 28 days after the date of the decision appealed from; and*
     - *(b) be served as soon as practicable on all other parties to the appeal."*

Lecture 12: Enforcing Judgments

Enforcing judgments

- What mechanisms can the court provide to get money out of a person given there is an order given to that effect?
- Enforcement is done through the relevant State courts.
- These are processes where the other party can't or won't pay you.
- Supreme Court Act 1991, don't even need to demand compliance before you seek enforcement.
- The judgment must be filed in the court before it can be enforced

Costs

- Enforcing money judgments
    - Enforcement debtor- person who is required to pay the money
    - Enforcement creditor – person to whom the money is owed.
    - Enforcement hearing
        - Try to gain information about the enforcement debtor's financial position
        - These involve a lot of steps and involve some money too.
        - Test the waters and so if you can pursue them for further payment.
        - Rule 803: the purpose of an enforcement hearing is to obtain information to facilitate the enforcement of a money order.
        - The hearing can take at the end of the trial or at any time after a money order has been made.
        - Once serviced with the statement if must be returned within 14 days otherwise they may be fined with contempt of court.
        - If this is not followed, it is possible to ask for an enforcement hearing summons. This is a court document, so failure to fill it out it contempt of court.
        - Rule 812: Get someone to come along to advise on that person's financial affairs.
        - After this process is followed, you can apply to the court for one of the following orders:
            - Rule 828: Seizure and sale of property
                - There is certain exempt property, which cannot be seized by the trustee in bankruptcy.
                    - assets held on trust,
                    - most ordinary household or personal items,
                    - tools used to earn an income,
                    - vehicles up to threshold value,
                    - life insurance policies,
                    - superannuation,
                    - compensation for any personal injury, and
                    - awards of a sporting, cultural, military or academic nature such as medals or trophies.
                - Rule 829
            - Rule 840: Redirection of debts
                - Orders a third party to pay the enforcement creditor instead of the enforcement debtor.
            - Rule 855: Redirection of earnings
                - "Earnings" is defined as any of the following things that are owing or accruing to the enforcement debtor:

        - Wages, salary, fees, bonuses, commission, overtime pay, or other compensation for services or profit arising from an office of employment.
    - Rule 868: Payment by instalments
        - Payment by the enforcement debtor in instalments.
        - Rule 869: The factors that the court must take into account.
    - Rule 875: Charging and stop orders
        - Order creating charge over property owned by the debtor
    - Rule 883: Appointment of receiver
        - Where the enforcement debtor has valuable property, and you want to get that asset from the debtor.
        - Where the debtor is not running or maintaining the asset properly, and it would be better for the creditor to instead receive a payment amount.
        - Rule 885
- Enforcing non-money judgments
    - E.g. order for possession of land or some other property
    - Rule 915: Warrant for possession of land
    - Rule 916: Warrant for delivery of goods
    - Rule 917: Warrant for seizure and detention of property
        - Same exemptions requirements as rule 828
- Contempt
    - Enforcement of an injunction that allowed someone to do something or prevent them from doing something. Breach of the consumer protection legislation requiring some product to do something.
    - Rule 921 – 932
- Arrest
    - Rule 935
        - Non-compliance with a judgment if a defendant is absconded or is about to abscond and the absence of the defendant would materially prejudice the plaintiff…
- Limitations on enforcing judgments against certain people

QCAT

- Queensland Civil and Administrative Tribunal
- Started in 2009, incorporated the functions performed by 23 bodies
- 14 permanent members (5 year terms)
- Adjudicators who do the civil claims and residential tenancy works
- All Magistrates of Queensland are part of QCAT for the purposes of residential tenancies work
- QCAT Divisions: Human Rights, Civil Division, Administrative Division
- Workload
    - 30,032 applications. 27,457 finalised. A significant number finalised without a hearing.
- Strong emphasis on ADR techniques.
- TJ Therapeutic Justice
    - QCAT isn't a TJ court, there is no link to a group of specialist practitioners to resolve issues.
    - However, psychologists have been used to resolve problems
- Solutions focussed organisation. Job is to bring matters to an end.
- Accessible, fair, just, economical, informal, quick,
- Tribunal must observe the rules of natural justice

- Proceedings must be quick. However, each party must understand the assertions made in the proceedings. The tribunal must ensure that each party understands the nature of the assertions and the legal implications of those assertions.
- QCAT Act does maintain obligations on the party's. It imposes positive obligations to act a certain way on the tribunal – accessible forum, parties are encouraged to represent themselves. We must be responsible to the cultural and other needs of the parties.
- Members must do so in a way that is fair and cost effective to the parties.
- Providing fairness to one in the context of fairness to all, presents challenges.

QCAT Procedures

Legal representation

- S 43 of the Act – The main purpose of this section is to have parties represent themselves unless the interests of justice require otherwise.
- S 43(2)(b) – Children, impaired capacity, failing disciplinary proceedings then you have a right to legal representation.
- Where you need leave to be represented
    - In the Building jurisdiction, you must persuade the tribunal that legal representation should be allowed
    - S 43 defines the criteria to apply.
        - Nature of the complexity – rare in a building dispute.
        - More likely to grant representation if both parties are represented.
- Timing – lawyers can be involved in the directions hearing.

COCOs – Compulsory conferences

- Preferred tool for reducing the load of matters that go to hearing
- Presided over by a member to achieve three things:
    - Reach settlement between the parties
    - Fulfil the obligation that each party understands the arguments made against them
    - Case manage the matter

Expert conclaves - The earlier they are involved, the more positive the contribution of that expert. They attend without the lawyer and the client. A member shares the conclave.

Use of assessors

- S 100-101
- The president can appoint anyone

Concurrent evidence is not requires, they are not all sworn in.

Exam

- Not directly assessed
    - Joinder of parties and causes of action
    - Evidence
    - Appeals
    - Enforcing Judgements
    - QCAT
    - Costs (not directly). Understand the different type of costs orders that may be made in QLD.
        - Solicitors costs, costs against non-parties, how you go about assessing costs
- May be assessed
    - Intro to Civil Proc – Case management

    - Trial – judgment
- Vast majority problem questions, but there are some short answer question.
    - 4 June 10-12
    - 7 June 10-12
    - 12 June 10-12

Final Exam

- Set out on the ECP
- 4 questions, only need to answer 3
- Problem based, but there are some short answer ones there too
- What has been covered in lectures and in the tutorials.
-

The course followed the conduct of a typical civil case in the Supreme Court of Queensland from the commencement of proceedings to trial and appeal. It includes the initiation of proceedings, service of process (including service in another State and service in a foreign country), pleadings, joining parties and causes of actions, default judgment, summary judgment, disclosure of documents, interrogatories, settlement procedures, appeals and the court control and management of litigation.

Topics that will **not** be directly assessed

- Joinder of parties and causes of action
- Evidence
- Appeals
- Enforcing judgment
- QCAT
- Costs will not be the focus of a direct question. Knowledge of the material covered in the topic of costs may assist you.
    - However, understand the different types of costs orders available.
    - Don't focus on solicotrs costs agreements, litigation funders, costs against non parties, public interest litigation, actions within the jurisdiction of a lower court, how you mechanically go about assessing costs.
- Commencing proceedings, service and pleadings. The following will not be directly assessed:
    - The rules of pleading in a civil case, the statement of claim
    - Replies/answers
    - The rules of pleading in a civil case; the defendant's response.
- Protecting positions. Not directly assessed:
    - Suppression orders
    - Detention and preservation orders
    - Security for costs
- Settlement and negotiation
    - Principals of negotiation

Only be directly assessed on

- Intro to civil procedure
    - Case Management
- Trial

- Judgment