Talbot Sayer Notepool

LAWS5215 – Civil Procedure Final Notes

TALBOTSAYER

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Starting a Matter

In order to start a matter and get a judge to make the orders you want, you need to ensure that the court (judge) has the power to grant the desired order – this is jurisdiction.

1 Jurisdiction & Forum

A Types of Jurisdiction

1. **Subject matter jurisdiction**
   a. Is the court authorized to determine that kind of dispute?
   b. (This is the main one to worry about – look to the act creating the court)
2. **Personal jurisdiction**
   a. Can the court exercise jurisdiction over the person? Does the court have reach?
   b. (Generally tends to rest on whether D can be served)
3. **Territorial jurisdiction**
   a. Geographically does the court have the power? Does the court have reach?
   b. (Generally tends to rest on whether D can be served)
4. **Inherent jurisdiction**
   a. Deals with powers of the court that it has to have to keep things rolling (procedural jurisdiction; about processes)
   b. E.g. inherent jurisdiction to ensure fairness, order a stay, order contempt of court

B State Courts

- **Supreme (top dog)**: Section 58 *Queensland Constitution*
  - Unlimited jurisdiction; subject to *Constitution* (Cth)
  - $750,000+
- **District**: Section 68 *District Court of Queensland Act 1967* (Qld)
  - Amounts between $150,000 and $750,000
- **Magistrates (bottom)**: Section 4 *Magistrates Courts Act 1921* (Qld)
  - Amounts up to $150,000
- **Court of Appeal:** only has appellate jurisdiction, sits beside Supreme Court
- **QCAT** is a thing, go here if claim under $25,000

Registries?

- Rule 33 – can always start at central registry (Brisbane)
- Rule 35 'General Rule' –sets out checklist
- Someone can object to which registry it is in – rule 38
- Can apply to move registry for convenience – rule 39
- Can change venue by agreement – rule 40

C Federal Courts

- Basically, *Constitution* provides that the Federal Courts and their jurisdiction had to be created by the parliament
  - S 75 – original jurisdiction of HC
  - S 76 can expand this original jurisdiction by parliament, but limited in how can expand
- The laws creating Federal Court jurisdiction: *Judiciary Act 1903*

- Section 30 'Original Jurisdiction conferred'
- Section 39B provides original jurisdiction of Federal Court

- Section 19 *Federal Court of Australia Act* and section 39B(1A)(c) *Judiciary Act 1903* provide federal jurisdiction

Where can things be heard?

- The Constitution does not limit federal jurisdiction at all, so federal jurisdiction can be exercised by State Courts
- **Accrued Jurisdiction** – even if 1 part of matter is federal, and 1 part is contracts or negligence, federal court can still here the whole matter – ***Re Wakim***
  - But can only join if the state issue arises out of the same facts as the fed one
  - Thinking behind this – resolution of one has bearing on the other – if successfully in one, other is void because can't have double damages
  - IF NO FED ELEMENT – can only go states, federal scope is limited to anything with a federal flavor – ***Re Wakim***

D Cross-Vesting

- Anywhere in Australia (all the Supreme Courts) can exercise the jurisdiction of all the other Supreme Courts of the States. Lower down this is subject to relevant limitations.
- *Jurisdiction of Courts (Cross-Vesting) Act 1987*: section 5 'Transfer of Proceedings'
- How to move it? On 3 ground
  - Matter arises out of or is relating to a matter pending in another court (s5(2)(b)(i)); and
  - Rare: the court where you first brought it, if it weren't for the cross-vesting legislation, would not have jurisdiction but the other court would and it's in the interest of justice (s5(2)(b)(ii)); or
  - Otherwise in the interests of justice (s5(2)(b)(iii)) – covers all
    - Relevant consideration includes substantive law, procedural differences, why P chose that place, substantive connections, cost & delay, witnesses

2 Limitation Period

A Common Causes of Action

***Limitation of Actions Act 1974* (Qld)** ("**LAA**") – limitation periods for most common causes of action are sections 10, 10AA, 11, 13, and 25

- Tort and contract claims without personal injury – s 10(1)(a)
  - 6 years from when cause of action accrued
  - Applies for classic property damage, claim for pure economic loss, professional negligence claims
- Actions founded on deed or other specialty
  - 12 years from when cause of action accrued
- Actions to enforce an arbitral award
  - 6 years from when cause of action accrued
- Actions for personal injury or wrongful death – s 11(1)
  - 3 years from when cause of action accrued

- LAA does have some qualifications for extensions of time
- Defamation – s 10AA
  - 1 year from date of publication of defamatory material
  - LAA does allow for extensions in some circumstances
- Actions to recover rent
  - 6 years from the date the arrears became due
- Actions to recover land
  - 12 years from the date the cause of action accrued

B Specific Statutory Causes of Action

- Section 7 *LAA* – whatever is provided as the limitation period in the legislation that creates the cause of action will prevail
- Examples:
  - *Competition and Consumer Law Act*
    - S 82(2) - 6 years from day cause of action accrued
    - S 87F – first to expire of the end of 3 years after date of discoverability of the death or injury, and the long stop period (12 years following the act or omission)
  - *Corporations Act*
    - S 1317K – an action for recovery must be commenced no later than 6 years after the relevant contravention

C Equitable Claims

LAA Application

- LAA only applies to very limited class of equitable claims
  - Action for an account – s 10(2)
    - Time period is 6 years
    - Asking the relevant trustee or fiduciary to give an account of how maters have been dealt with in the relationship
  - Equitable interest in land – s 16(1)
    - Action to recover that interest
    - Same period applies as if you were recovering a legal interest
    - Therefore, time period will be 12 years
  - An action for an innocent breach of trust – s 27(1)
    - 6 years from when breach occurred
    - No limitation period if trustee has committed a **fraudulent** breach of trust
  - Claim relating to administration of a deceased estate – s 28(1)
    - 12 years from when the right to receiver your interest accrued (generally on the death of the testator, but if conditional interest could be different)

- Note, s 28 applies subject to s 27, so if there has been some kind of fraud by the personal rep, there is no limitation period

- Aside from above, LAA does not apply to equitable claims. So for claims for breach of non-trustee fiduciary duties there is no limitation period (subject to exception
  - Section 10(6)(b) – ordinarily no limitation period where specific performance is sought of a contract or where a claimant seeks an injunction

Exception

- Court has a discretion to apply a statutory limitation period by analogy to an equitable claim where facts giving rise to a claim would found an action at law and an action in equity and where substantially identical relief would be available in each case
- Cases:
  - ***Knox v Gye*** **(1872) LR 5 HL 656**
    - Trust money paid to a person under a mistake of fact, B sues for return of money
    - While Bs title to money is equitable, action is substantially similar to CL action for money had and received (ergo 6 year limitation period)
  - ***Cohen v Cohen*** **(1929) 42 CLR 91**
  - ***Coulthard v Disco Mix Club Ltd*** **[2000] 1 WLR 707**
    - Damages for fraudulent breach of contract and equitable compensation for breach of fiduciary duty can arise from same factual situation
    - "It would have been a blot in our jurisprudence if those same set of facts gave rise to time bar in common law courts but none in a court of equity."
  - ***P&O Nedlloyd BV v Arab Meats Co*** **[2007] 1 WLR 2288**
    - Claim for specific performance of a contract is sufficiently *different* to a claim for CL damages for breach of a contract
    - Distinction is because specific performance is not monetary remedy; further, SP does not require there to be a breach of contract
    - Therefore, facts needed to support claim for SP are not in all respects same as needed for breach of contract
    - Can draw analogy with injunction for breach of contract
- Note, for breaches of fiduciary duty by **company directors**, this is sufficiently similar to causes of action under *Corporations Act* so 6 year limitation period under *Corporations Act* applies to the equitable claim as well
  - ***White Constructions (ACT) Pty Ltd v White*** **[2005] NSWSCA 173**
  - ***Hamilton v Kaljo*** **(1989) 17 NSWLR 381**
  - ***Gerace v Auzhair Supplies Pty Ltd*** **(2014) 87 NSWLR 435**
- A statutory limitation period will not be applied by analogy if it would be unjust to do so

- ***Barker v Duke Group (in liq)* (2005) 91 SASR 167:** Makes it clear that will not occur if unjust
- ***Gerace v Auzhair Supplies***: Felt the relevant test is one of unconscionability rather than injustice (much stricter standard)
- ***Issa v Issa* [2015] NSWSC 112:** Disapproved *Gerace*, as other cases have also done. So, test remains one of <u>unjustice.</u>

- A court can also refuse a remedy on the basis of acquiescence or laches (i.e. P is guilty of disentitling conduct)
  - ***Fisher v Brooker* [2009] 1 WLR 1764**
  - S 43 LAA – nothing in this act affects the courts ability to refuse relief on grounds of acquiescence or otherwise

D Date of Accrual

1 Start

Limitation period runs from when cause of action accrues

- *Action* is defined as any proceeding in a court of law – s 5(1) LAA
- *Cause of action* is given meaning in the following cases:
  - ***Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234**
    - Wilson J at 245 – "It is simply the fact or combination of facts which give rise to a right to sue."
    - "Knowledge of the known legal consequences of an act are not a relevant fact for there to be a cause of action." – ignorance of the law is no excuse
  - ***Read v Brown* (1888) 22 QBD 128**
- General rule for accrual of cause of action: ***Thomson v Lord Clanmorris* [1900]**
  - A cause of action arises when:
    - (1) All necessary facts which give rise to a cause of action have occurred
    - (2) There is a competent Plaintiff who can sue and a competent Defendant who can be sued

2 Stop

- Running of limitation period is ordinarily stopped when a proceeding is commenced – ***Turagadamudamu v PMP Ltd* (2009) 75 NSWLR 397**
- However, extensions of time available when P complies with statutory pre-claim procedures:
  - S 59 PIPA – if complying notice of claim is given before end of limitation period (generally 3 years) then claimant may start proceedings in court based on claim even though period of limitation has ended
    - BUT proceeding must still be commenced within 6 months of that notice of claim (slight exception)
  - *Motor Accident Insurance Act 1994* (Qld) – comply with pre-claim procedure, then you get a slight extension of time
- Service of an originating process is not required within the relevant limitation period for a claim

- If the time for service expires, however, and the originating process is not renewed by the court, the P will be out of time
    - ***Seabridge v H Cox & Sons (Plant Hire) Ltd*** **[1968] 2 QB 46**
        - If not served within 12 months (rule 24(1)) AND limitation period runs out, AND originating process is not renewed by the Registrar under rule 24(2), then limitation period will be deemed to run until issue of new originating process
        - This will be fatal to the claim if the limitation period has expired

E Tort Claims

- Generally, 6 year limitation period – section 10(1)(a) *LAA*
- Note, Qld and WA are only jurisdictions that have no special limitation period for actions regarding defective building works unless of course there is personal injury

Economic Loss Arising from Latent Defect

- ***Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd*** **[2014] QCA 233** – physical damage in latent building defect; cause will accrue when latent defect first became known or manifest in the sense of being discoverable by reasonable diligence

Claim for Economic Loss arising from Negligent Advice

- Lots of confusion in the case law; HC has had some stuff to stay
- ***Wardley Australia Ltd v Western Australia*** **(1992) 175 CLR 514**
    - Preferred view is now that the cause of action does not accrue when negligent advice was provided, or upon entering into agreement as a result of negligent advice
    - Rather, cause of action accrues at a later time - when loss is actually crystalized through the fulfillment of a contingency on which the relevant agreement or transaction entered in to as a result of the negligent advice depends
    - Facts: As a result of M&D conduct by Wardley, state of WA granted an indemnity to NAB to secure a bill facility. Indemnity was later called upon.
    - Held: cause of action accrued at the time the contingency was fulfilled (when the indemnity was *in fact* called upon)
- ***Commonwealth v Cornwell*** **(2007) CLR 519**
    - Cth employee was convinced not to join a superannuation fund due to misleading advice given by his superior.
    - Held: cause of action did not accrue until date of employee's retirement when super entitlements became due and payable. Any loss prior to that time was *contingent only*.

Defamation

- Basic starting point: 1 year from date material is published
- Can be extended for further 2 years (max 3 years from date published) – s 32A LAA
    - Can apply to the court
    - Application under this section can be made even if 1 year has expired
- S 32A(2) provides a qualification: P must show it was not reasonable for a claim to be commenced in time. This is a difficult test to satisfy. See:
    - ***Noonan v MacLennan*** **[2010] 2 Qd R 537**

- Test for granting an extension: P must be able to point to matters which are *so compelling* as to make it *positively unreasonable* for a person defamed not to exercise their legal rights to sue within the 1 year limitation period
- Note a P does not act reasonably in delaying start of proceedings while some investigative or disciplinary proceeding is undertaken (some outside court process)
- In this case, not reasonable for P to delay action because pursuing QUT's internal procedures
- What would be sufficient? P is unable to assess extent of defamation, or is without evidence necessary to establish his or her case – an action brought in such circumstances might be said to be speculative or irresponsible

Personal Injury and Wrongful Death

- Starting point: 3 year limitation period – s 11(1) LAA
- No limitation period for dust-related condition – s 11(2) LAA
- EXTENSION (s 31(2) LAA) can get 1 year extension if court satisfied that:
  - Material fact of a decisive character relating to the cause of action was not within the means of knowledge of the P until a date within 1 year before limitation period expired; AND
  - There is evidence to establish the cause of action
    - ***Minoque v Bestobel Industries Pty Limited*** **[1981] Qd R 356**
      - P need not prove on balance of probabilities that cause of action exists, nor in fact tender evidence of which it intends to rely on at trial
      - P need only satisfy court that evidence does in fact exist which in due course could (possibility not probability) be adduced at trial
- Material Facts of a Decisive Character? Section 30 LAA
  - (1)(a) – Material facts relating to a cause of action include:
    - The fact of the occurrence of negligence, trespass, nuisance, or breach of duty
    - The identity of the person against whom the right of action relies
    - The fact there has been personal injury suffered
    - The nature and extent of the personal injury
    - Issue of causation
  - (1)(b) – Decisive character if and only if reasonable person knowing those facts and having appropriate advice would believe those facts showed that an action would have a reasonable prospect of success and that a P ought to bring an action
  - ***Byers v Capricorn Coal Management Pty Ltd*** **[1990] 2 Qd R 306**

F Disability, Fraud, or Mistake

- Limitation period can be extended in all cases in circumstances of **disability** – ss 5(2), 29

- S 29(1) – if on date cause of action accrues P is suffering *existing* disability, then cause of action can be brought at any time before expiry of **6 years** from date the person **ceased to be under disability or died**
- S 29(2)(c) – where personal injury or wrongful death, as above but **3 years**
- S 5(2) – definition of disability (limited) – a person is under a disability if they are under the age of 18 or are of unsound mind (so no provision for physical disability, unlike NSW and ACT).
    - No exception for where a P is imprisoned.
    - We are most limited jurisdiction in Aus for this
- ***Batistatos v Roads & Traffic Authority of NSW* (2006) 226 CLR 256** – cautionary tale
    - Court is still free to stay an action for an abuse of process where brought by a person many years after cause of action accrued because of the disability
    - Car accident; sued 29yrs later for poor road design
    - Factors court considered included: the unavailability of records from the police department of the time, inability to locate medical records, difficulty in locating experts in relation to road maintenance work, and the fact that the road itself had been gutted and redesigned since

- Extensions also possible in circumstances of **fraud or mistake**
    - S 38(1) LAA – for cause of action where the cause of action itself is based on the fraud of the D, or for any cause of action where the relevant facts are concealed by the D, or it otherwise arises from mistake, then the limitation does not begin to run **until P has discovered the fraud or mistake** (or could have done with reasonable diligence)
    - Fraudulent concealment
        - ***Grahame Allen & Sons Pty Ltd v Water Resources Commission* [2000] 1 Qd R 523** – necessary to establish consciousness of wrongdoing to say there has been *fraudulent* concealment, If can't show this knowledge then don't get the benefit of the extension
    - ***Hamilton v Kaljo* (1989) 17 NSWLR 381** – why dis here?

G Onus

- The Defendant has the onus of showing a claim is statute barred:
    - ***Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27**
    - Defendant has to specifically plead this as a defence
- However, the plaintiff must establish any relevant disability, fraud or mistake or the grounds for an extension in cases of defamation, personal injury or wrongful death:
    - ***Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541**

3 Parties

A Who Must You Include? (mandatory)

- Rule 62(1) – each person that is *necessary* to enable the court to adjudicate effectually and completely
    - (2) can make an order for a party to appear to allow for that proper adjudication (so if you mess up/don't realize until later that someone is necessary, can still add them)
- Rule 63 – where 2 or more parties are jointly entitled to same relief from defendant, must all be made Ps or Applicants
- Rule 64 – if two or more persons are:
    - Liable jointly or severally, don't have to all be made Ds or Rs
    - Liable jointly only then all do have to be made Ds or Rs

B Who May You Include? (Joinder)

This is optional inclusion

The Everyone Rule

- Rule 64(1) – 2 or more persons may be Ps/As or Ds/Rs in the same proceeding if:
    - Common question of law or fact; or
    - The rights to relief arise out of the same transaction or series of transactions
- Note similar test/rule applies for multiple causes of action – r60 (see discussion in originating process section)

DRs Only

- Rule 65(2) – 2 or more persons may be Ds or Rs if:
    - Doubt to which the applicant is entitled to relief, or
    - The amounts by which each may be liable, or
    - Where damage or loss has been caused by more than one person, even if no factual connection
- Rule 66 – not necessary for every D and R to be relevant to every relief sought or every issue before the court

Removal of Ppl

- To control abuse, Rule 68 gives court *residual power* to order separate proceedings if continuance of single proceedings will:
    - Delay trial,
    - Prejudice another party, or
    - Lead to any inconvenience
- Rule 69(1)(a) – a court at any stage of the proceeding can order that a person has been improperly included, or is no longer necessary, and can be **removed** from proceeding

4 Commencement

A Which Originating Process to Use?

- Firstly, rule 3 dictates that the UCPR applies to the Supreme, District and Magistrates Court in Queensland.
- Secondly, rule 8 provides that a proceeding commences with the issue of an originating process

- Thirdly, rule 8(2) dictates the types of originating processes available. Namely,
  - Claim
  - Application

Now, in terms of which one:

- Rule 9: a claim must be used as the originating process in Queensland, unless the UCPR requires or permits otherwise
- Rules 10 & 11 set out when an application is required or permitted
  - Rule 10 - application is **compulsory** if:
    - A person is given a right under a particular piece of legislation to apply to the court for relief; and
    - Neither the legislation or the UCPR state the type of originating process to be used; or
    - Otherwise no claim is required or permitted under the legislation
    - Example: an originating application, as opposed to a claim, is required under the *Corporations Act* pursuant to Schedule 1A
  - Rule 11 – application is **permitted** if:
    - The only or main issue is an issue of law AND a substantial dispute about facts is unlikely
    - No opposing party
    - Insufficient time to prepare a claim & urgent nature
- Rule 12 further **permits** an oral application if:
  - Urgent relief is sought
  - On the condition that the representing lawyer undertakes to later file a written application in the time directed by the court
- If you **choose incorrectly**, the court can deal with this issue under rules 13 & 14
  - Basically, the court can just deem it as though the correct processes had been used (remedial provisions)
  - Reference 13 if incorrectly started by claim; and reference 14 if incorrectly started by application

B Requirements for a Claim

Go to Rules 17 – 20 for **General Requirements**

- Rule 20 – requires copy of originating process to be filed and kept by court (basically just print 3 copies, one for you, one for court, one to serve – because the defendant must be served with a sealed copy)

For **Particular Requirements**, go to Rules 22-23 (mechanical stuff)

- Claim form: Form 2
- Attached to Claim is statement of claim, which sets out the main basis for your claim

- Rule 23 requires that the claim must include statement about filing notice of intention to defend claim
    - (a) Must specify the relevant time limit for filing notice of intention to defend; and
    - (b) That if do not file defence in time, default judgment may be filed

How long does a claim remain valid? Look to Rule 24

- 24(1) Claim remains in force for **12 months** starting from day it is filed.
    - This also becomes the time in which the defendant must be served with a copy of the claim
- 24(2) the Registrar has the **power to renew** the claim if it has not been served within the 12 month period
    - Must satisfy the Registrar that reasonable attempts have been made to serve the D, or that there is some other good reason
    - Note, each renewal period can only be for an additional 12 months
- 24(6) if claim is renewed, it is deemed to have commenced the day the claim was originally filed
- Two cases that demonstrate merely because limitation expired, no reason for the registrar to deny the renewal of a claim, it is just one factor to take into account:
    - ***High Top Pty Ltd v Lawrence*** **[2010] QCA 270**
        - Quoted in this case is Bray CJ in ***Victa Limited v Johnson*** where it was said: "What the failure to serve a writ within twelve months gives the defendant is no more than a right to contend that the Court in the exercise of its discretion should not renew the writ."
    - ***Muirhead v The Uniting Church in Australia Property Trust (Q)*** **[1999] QCA 513** – Pincus JA summarized principles from previous cases:
        - (1) There is a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties.
        - (2) The discretion may be exercised although the statutory limitation period has expired.
        - (3) Matters to be considered include the length of delay, the reasons for it, the conduct of the parties and the hardship or prejudice caused to the plaintiff by refusing renewal or to the defendant by granting it.
        - (4) There is a wide and unfeterred discretion and there is "no better reason for granting relief than to see that justice is done."

C Requirements for an Application

Requirements are listed in Rules 26-28

- Relevant form – Form 5
- Adopts similar structure to the claim
- Difference: required to file the affidavits on which you intend to rely (rule 26(4)), because applications are very commonly heard on the papers

Quick Service Note

- Must serve each respondent at least **3 business days before** the day set for hearing the application (rule 27(1)).

D Amending Originating Process Post-Expiry of LP

- Plaintiff can rely on Rule 376 to amend an originating process after the expiry of a limitation period
    - This rule allows you to correct a mistake in:
        - Name of the party
        - Change the capacity in which the P sues
        - More broadly, 376(4) - court can give leave to make an amendment if the cause of action arises out of the same set of facts which the original application relies
    - This rule overturned ***Weldon v Neal*** which said only peculiar circumstances
- Discretionary amendment is also possible after the expiry of a limitation period under section 16 *Civil Proceedings Act 2011* (Qld)
    - ***Draney v Barry*** **[2002] 1 Qd R 145** – this section gives the court general discretion to add a cause of action to an existing originating process outside of the time where it is in there interests of justice (in addition to rule 376)
    - BUT this is a very serious thing for the court to allow, so court may be unlikely to exercise this broader discretion
    - "By its very nature, such an application requires an indulgence for the applicant with a corresponding detriment for the respond, and it is hardly surprising that courts in the past have associated such applications with the need for 'special circumstances'."
- BUT for the addition of a party after the expiry of a limitation period, look to rule 69(2) UCPR
    - Need to rely on the specific rule for adding new parties, see:
        - ***Lynch v Keddell (No 2)*** **[1990] 1 Qd R 10**
        - ***Althaus v Australia Meat Holdings Pty Ltd*** **[2007] 1 Qd R 493**
        - ***Montgomery v Pickard*** **[2006] QSC 373**

MORE THAN ONE CAUSE OF ACTION

- Rule 60 – can have as many causes of action as you like, but have to meet certain requirements
    - Common issue of law or fact
    - Arising out of same transaction, event or series
    - Can do it if the court gives leave (want to avoid having to rely on this)
    - (Note, this is the same test as for joinder, but just for causes of action)
- Rule 68 – general discretion with regards to this
    - So if it's going to be inconvenient they can boot a cause of action

D Personal Injury Applications

Personal Injuries Proceedings Act 2002 **(Qld)** (**"PIPA"**)

- Special pre-claim procedures before a claim can be filed in accordance with the usual rules of the UCPR

Application of the provisions

- Applies to all *personal injuries* arising out of an incident that happened before, on, or after 18 June 2002 (commencement of PIPA)
- *Personal Injury* defined to include a facial, prenatal, psychological injury and a disease
- *Incident* defined to include an accidence or other circumstance that gave rise to the personal injury
- Does not apply to (per section 6(2)):
    - Dust related injuries (asbestos)
    - Personal injuries that resulted from a car accidence (separate legislation)
    - Workplace injuries (whole other demon)

Key Requirements

- Sections 9(1) and (1A) – the P needs to give written notice to the D of its intention to make a claim
    - There is an approved form for this that comes in **two parts**
- Part 1 of the notice delivered first
    - Section 9(3) – time limit for serving is earlier of 9 months from date of incident and 1 month from date the plaintiff first instructed a lawyer to act on their behalf
        - Personal service is not required, but is recommended
    - Content: This notice sets out description of incident, details of medical treatment, any existing medical conditions and injuries, and a description of what caused the incident
    - IMPORTANT – until this notice is given, the plaintiff cannot proceed with a claim. This is important for limitation periods.
    - Defendant's Response: D has 1 month to acknowledge notice (section 10)
        - Note if D does not respond in that time, D is deemed to have accepted
        - The other course is to acknowledge it has been served but then raise a dispute about the form
- Part 2 of the notice is more substantial
    - If part 1 has been accepted, plaintiff must serve Part 2
    - Must be served within 2 months of the earlier of the date the D in fact replies, or is presumed to have accepted service
    - Content: This notice sets out complete nitty gritty of the incident and attaches all relevant documents to it
- For medical negligence claims, there is a further requirement to serve an initial notice to the defendant – s9A PIPA
- Following these notice requirements, **section 20** imposes various obligations on the Defendant to try and resolve claim within **6 months** after receiving the complying part 1 notice
    - E.g. making reasonable enquiries; written offer or counter offer
- Then section 36 – compulsory settlement conference must be held before court proceeding can be commenced (unless court dispenses with requirement)

- Sections 39 & 40 provide procedure for exchanging mandatory final offers
- If matter still not resolved, then proceedings in court must be started **within 60 days** of conclusion of compulsory conference
    - (Or some alternative time periods set out in section 42)

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4 Defendant's Response

Time Limit

- Defendant has 28 days from being served to file notice of intention to defend – rules 137
    - Note, not allowed to take any steps in proceedings unless such notice is filed, unless have leave of court – rule 135
- Can be filed late under rule 138, but risk default judgment

Formal Requirements

- See Rules 139 – 142 UCPR
- Form 6 for notice of intention to defend, attach your defence with very particular responses to every single statement in the statement of claim
- Can file an **unconditional** notice of intention to defend OR a **conditional** notice
    - Unconditional notice – does not mean conceding everything they say, rather means you don't think any irregularity with where claim has been filed etc. (rule 144(7))
    - Conditional notice – appropriate where D seeks to challenge an irregularity in the P's claim, or the manner in which service was effected, or to challenge court's jurisdiction
        - If this is filed, then defendant must comply with time limits in rule 144 UCPR:
            - Must bring proceedings in a reasonable period of time (**14 days**) (rule 144(4)), otherwise deemed to have filed unconditional notice (rule 144(5)(a))
            - **7 days** to file a defence once a conditional notice is deemed unconditional

5 Service

Service is fundamental in ensuring natural justice in the application of law.

Kioa v West – "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it."

First: figure out what service is required.
Second: figure out what needs to be done to satisfy the requirements for such service.

A Personal Service

I Is it Required?

- Personal service is only required if expressly stated: Rule 105
- 105(1) – originating process must be served personally on the defendant
- R 111 – Magistrate Court proceedings do not typically require personal service
    - Unless court otherwise orders, personal service is not required;
    - D can be validly served by leaving originating serve with an adult @ address or by leaving with Ds solicitor)

II How to Do IT

- Rule 106 provides the general means for effecting personal service
- To serve personally, must give doc or copy of it to the person intending to be served
- If don't accept? Can be served by putting it down before the person and telling them what it is
- R 115 – despite typical rules for personal service, solicitor may accept personal service for an originating service.
    - Solicitor must make note on copy of originating process to accept that service
    - Unless D shows at a later time that solicitor had no authority to do so, that is deemed as personal service on D

Personally Serving a Corporation

- Rule 107 – personal service of the corporation is effected by manner specified in *Corporations Act*
- S 109X *Corporations Act* – doc may be served on company by leaving it or posting it to the registered office (can't do this to person because no person)
- Registered office?
    - Sourced through ASIC search
    - Other means are delivering it to director residing in Aus, or leave with liquidator or administration (not super common in practice)
- When deemed delivered?
    - Section 29(1) *Acts Interpretation Act* – where an act requires service by post, that will be deemed to be delivered, unless contrary proved, will have been effected at the time it would ordinarily have been delivered by post.
    - ***Fancourt v Mercantile Credits*** – delivery not disproved, then proof of non-receipt does not displace the result that delivery has not deemed to have taken effect in the ordinary post way
        - So basically, D has to show P never delivered, not that never received it
        - (This is hard to do)

Other Special Rules

- R 108 – special rules for minors (serve guardian or litigation guardian)
- R 109 – persons with impaired capacity (serve guardian)
- R 110 – special rule for prisoners (serve in charge of jail person)
- R 114 – special rule for partnerships

- S 52 *Motor Accident Insurance Act* – special rule for motor vehicle accident
  - Needs to be brought against the insured person AND insurer as joint defendants
  - S 52(6) if originating process served on insurer, then the insured person is also taken to have been served

III What Happens Once Served

- If defendant serves notice to defend, then claim is deemed to have begun the day that notice has been filed – rule 105(2)

B Ordinary Service

- All documents after originating service can be sent by ordinary service – rule 112
- Can leave doc with someone at address; can post doc to address; can fax or email it; can also just leave with solicitor

C Substituted Service

- Rule 116 – where personal service is impractical a court can make an order for substituted service. Order will specify alternative means of service that will be sufficient
- ***Hilaire v Harvie*** – can advertise originating process in newspaper (locally and Aus wide)
- ***Bradvica v Radulovic*** – can post it to last known addresses of the defendant
- ***Dymond v Croft*** – can leave doc with someone who is believed to be in contact with the person recently
- ***Foxe v Brown*** **(HCA)** – need to show personal service *unlikely to be effective* AND proposed *alternative means* of service are the best way to bring the document to the attention of the person

D Informal Service

- Rule 117 – if document comes to the attention of the defendant then court can order that there has been informal service
  - This is the case even if personal service is required but has not been done
- Do try and avoid this though – it's not super ideal

E Interstate Service

- Rule 123 – originating process must be served in accordance with *Service and Execution of Process Act 1992* (Cth) (**SEPA**)
- S 15 SEPA – gives P right to serve originating process issued in one state in another state or territory
- S 16 SEPA – provides there is an additional procedural step to comply with: service is only effective if **Form 1 of SEPA** is attached to the service (sets out all Ds rights)
- S 17 SEPA – gives D 21 days or the period that would have been allowed in place of issue, whichever is longer, to enter an appearance (the process for entering their defence).
  - In Qld, that period is 28 days (obv) – r 137(1)
- S 21 SEPA – once originating process served pursuant to SEPA, a court in the place of service is not entitled to restrain the continuance of proceeding on the basis that it is not the appropriate form (so no jurisdiction to refuse that other court deals with it)

F International Service

- Can you establish a jurisdictional connection?
  - Rule 124 – do not leave if can established this
  - This rule sets out relevant factors to establish appropriate nexus for Qld
  - Some clear contract cases where service without leave is allowed:
    - Contract was made in Queensland
    - Parties to contract agreed to submit to jurisdiction of Qld
    - Proceeding is based on a breach of contract that is committed in Qld, regardless of where contract made
    - (r 124(1)(g)(i))
  - Some clear tort cases where service without leave is allowed:
    - If tort is committed in Queensland
    - Also if the all or part of the damage was suffered in Queensland and caused by a tortious act or omission – r 124(1)(l)
      - So this applies even if tort was committed not in Qld (e.g. negligent manufacturing overseas)
- If can't, can get leave of the court – R 127
- How then do you effect service?
  - Rule 129: service is effected by personal service, ordinary rules under UCPR apply for Ds response (unless some overseas laws contrary to that)
- Can jurisdiction be challenged? ***Agar v Hyde***
  - If can show it is the *inappropriate forum*; or
    - Stricter than ***Spiliada*** test
    - ***Oceanic Sun Line Special Shipping Co v Fey*** – merely showing court in another jurisdiction is more appropriate forum is not enough. Need to show it would be unjust to keep it in this local court, and that t wouldn't be as inconvenient to go over seas
    - ***Puttick v Tenon*** – emphasis is on showing how inappropriate local court is, rather than appropriateness of overseas court
  - If the claim has an insufficient chance of success to warrant a foreign defendant being put to the time, expense and trouble of defending it; then
  - Can mount a jurisdictional challenge even if service effected
- Hague Convention Countries – see rules 130-130L
  - Can leave with consulate
- NZ has special process – *Trans-Tasman Proceedings Act 2010* (Cth) – basically service is effected per usual Aus procedures
  - Jurisdictional challenge – more appropriate forum test – s17 TTPA

6 Third Party Procedure

- Rule 192: a defendant may file a third party notice in a range of circumstances:
  - (a) If there is a claim for contribution or indemnity
  - (b) To claim relief against a person not already party to proceedings where the relief relates to or is connected with original subject matter, and is substantially the same as some other relief claimed by the plaintiff
  - (c) Question or issue relating to or connected with original subject matter which is required to be decided as between P and D, as well as between P or D and a person who is not already a party to the proceedings, even where relief sought may not be same
- Case on 192(a): ***Standard Securities v Hubbard***
  - 2 agreements for sale of same land. Third party agreed to sell land to D, who then agreed to sell land to P. When third party did not complete sale, D was automatically in default of P.
  - Held: relief sought against D by third party, being specific performance of agreement, was connected by the specific performance in turn sought by the P against the D, so that it fell w/in equiv rule in England.
- Rule 193-198 sets out how you go about this; approved form for notice etc.
  - R 194 – D can't get a third party notice filed until defence filed
  - R 195 – personal service is required on third party

7 Discontinuance and Withdrawal

- Plaintiff can withdraw – r 304
  - Before being served with first defence or first affidavit in response to OP
  - After that, require courts leave or consent of other parties
- Defendant can withdraw – r 305
  - Before being served with P's answer to counterclaim
  - With court's leave or consent of other parties after that
- Prescribed from for discontinuance – Form 27
  - Requires statement to be made as to whether or not the first defence or first affidavit has been filed
- Where a response has been made to proceedings, beyond that point, any discontinuance or withdrawal requires leave of the court or consent of the other party to effect the discontinuance.
- Whilst there is a policy objective that litigants won't be forced to litigate against their will (e.g. plaintiff who commences proceedings but decides does not want to proceed), the reason require consent or leave, is that two factors that arise:
  - (1) costs – if D has already filed defence have incurred cost of drawing the defence and having it filed
  - (2) prejudice – may arise depending on circumstances.

Costs

- R 307 – requires anyone who discontinues or withdraws is liable to pay the costs of the other party up to the point of the discontinuance and the costs of another party or parties caused by the withdrawal

- If the party discontinues with the courts leave, then the court may make whatever costs order they consider appropriate
- R 307 operates independently of the rules about when you require leave or consent – while although you need consent after the filing of the defence to withdraw a claim (and usually only gives consent if also get a costs order), even if the plaintiff unilaterally discontinues its claim prior to defence being filed, rule 307 can still operate for a defendant to still come back and say hey you served me and even though have not filed, still incurred costs and I want them

Subsequent Proceeding

- Rule 310: a discontinuance or withdrawal is not a defence to another proceeding on the same or substantially same ground (no issue estoppel ground)
- Practical Answer: If P seeking consent of D to discontinue proceedings, D can require (in addition to costs) the entry into a settlement deed that includes terms for a release and bar and indemnity against new claims arising out of the same subject matter – an agreement that P won't re-agitate or commence fresh proceedings on this subject matter
- Why would P change their mind?
    - Often if you have a corporate client and have a change of management or control, and that new management comes in and asks well why did we not prosecute that action two years ago? And then they realize they still can

Interlocutory

1 Case Management

General intro/where court gets power to case manage

- Rule 366: court may give directions about the conduct of proceedings at any time
- Rule 367: type of directions order that the court may make
- Rule 368: a proceeding may be managed by the court as constituted by a particular judge in accordance with an order, direction, or practice direction about case management
    - This rule underpins power of court to issue practice directions; once issue have same force as rules
    - PDs more flexible, easier to amend
- Rules 371 & 372 deal with how to apply where failure to comply with rules (see below)
- Rule 374: failure to comply with order
    - Court has wide discretion as to consequences
        - May give judgment against non-compliant party
        - May extend time for compliance
        - May make a whole other order
        - May amount, in some circumstances, to contempt of court

A Commercial List

- Created by Practice Direction No. 3 of 2002
- Based on rules and giving effect to *Commercial Causes Act 1910* which confers extensive powers on Supreme Court to make orders in relation to commercial matters
- Who gets on the list?
    - If issues are or are likely to be of a general commercial character or arise out of trade or commerce in general
    - Estimated time is 10 days or fewer
    - Special case – if longer than 10 days – will be placed on commercial list and becomes subject to control of particular judge who is the designated commercial judge at that time
    - 13 factors in practice direction indicating may be commercial:
        - Construction of a business contract
        - Insurance, banking
        - Takeovers
        - Exporting of goods etc.
- Booted from the list?
    - The commercial list judge has discretion as to the entering and retention of matters on the list

- After a period of time if it becomes obvious to the judge that the matter is protracted (not ready for a speedy hearing) may remove it from the list and send it back to general list
- Powers / directions judge can make
  - Can dispense of rules of evidence, and give directions in relation to speedy hearing of matter
  - Can dispense of pleadings altogether
  - If super speedy resolution needed can exchange document that provides the issues to be determined by the judge, can make amendments to it after discussion with parties, then the matter is listed for hearing
- Also can use commercial list for an expedited hearing of an appeal
- Note, there won't be too many cases that get on the list (they are the exception)
- But, if on the list, subjected to very strict supervision and very strict compliance with directions given by judge a required (if non-compliance, will just be booted from list)
- Case examples:
  - ***David Jones Ltd v Perpetual Limited*** **[2006] QSC 337** – DJs primary tenant in building under construction. Developer halfway through construction wanted to alter plan, DJs objected. As halfway through construction, it was urgent = CL
  - ***Pauls Trading Pty Ltd v Norco*** **(2006)** – Italian deconstruction, need ed to resolve the Aus subsidiaries by 22 April 2006. All began on 2 Feb 2006 and by 21 April 2006 the Court of Appeal had given their judgment.
    - Matter – essentially construction of some clauses in a JV agreement

B Supervised Case List

- Practice Direction No. 11 of 2012
- Para 3 – to the extent that it is consistent with the just determination of cases, supervision aims to maximize the efficient utilization of time allocated to the hearing of cases on the list, to ensure that at the trial the party is focused on matters that are genuinely in issue, and that evidence is given as efficiently as possible, and to minimize the risk of adjournment.
- Para 7 – the basis on which a matter will be listed on this list are these:
  - The party estimates that the trial or hearing will take more than 5 days
  - Group of cases proposing a greater than normal demand on the resources of the court and the length of time the trial is likely to take
- Once placed on this list, it will be reviewed from time to time
  - More often than not on a monthly basis
  - Have to go back to the judge in charge of the list every month and indicate what steps have been taken, what the issues are in dispute, and how the matter is progressing towards trial
- This practice direction is 20 pages long (extensive doc)
- It is not for every case in the Supreme Court – 10-15% at most
- If matter is on the case list then there is a significant increase in pre-trial cost because of the frequency that you have to report to the judge about the steps taken
- But the benefit of this is that you are resolving the matter expeditiously

Discovery

- One of the areas that the supervised case list manager will be looking at very carefully is in relation to **discovery**
- Discovery is one of the major obstacles to matters which find their way on to the supervised case lists
- With emails and the like these days, a major matter can lead to the perceived necessity of discovering thousands of documents
- One of the matters in the practice direction is document control. You have to put before the judge a document plan – indicating what documents you consider will be the most relevant so that the judge can then make appropriate orders limiting the areas of disclosure
- This is one of the reasons why one does not normally race the matter off to the supervised case list

C Case Flow Management Civil Jurisdiction

The naughty list

- Practice Direction No. 17 of 2012
- This practice direction is based on the expectation that most proceedings will be ready for trial or otherwise resolved within 180 days of filing of the defence
- If not, the Registrar will issue a show cause notice, and you have to appear before the judge in charge of this list and explain why the matter is not ready for trial
- What the show cause notice requires is that the parties show cause why the proceedings should not be deemed resolved
    - Deemed resolved means that the proceeding is in abeyance and no step can be taken unless and until the matter is reactivated by order of the court
- If a party is able to show cause such that the matter is not deemed resolved, the judge will ordinarily then make specific orders as to the future conduct of the proceedings so that if those directions are not complied with it will be much easier on the second round to have the matter deemed resolved

D CM / Power of Amendment and Rule 5

Power of Amendment (as an interlocutory application)

General

- Rule 375: General power of amendment
    - At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate
- Rule 381: Need to amend it within specified time
    - An order giving a party leave to amend the document ceases to have effect if the party has not amended the document in accordance with the order at the end of the time specified by the order for making the amendment, or, if no time was specified, at the end of 14 days after the day on which the order was made.

Post-Limitation Period Expiry Amendments

- Rule 376: amendment after limitation period
    - Can change (2) name of a party; (3) capacity suing in; or (4) add a new cause of action
    - In all cases court must be satisfied that such an amendment is appropriate

- 376(2) Court can give leave to change name of party if it is satisfied that it was a genuine mistake, and is not misleading
- 376(3) Court can allow altering capacity in which a party has sued after the expiration of the limitation period
- 376(4) - Court may (as supported by other legislation) give leave to include a new cause of action if it arises out of the same facts or substantially the same facts for which a cause of action that relief has already been claimed

Interaction with Rule 5

- Rule 5 is the overriding philosophy that provides the purpose of the rules is to facilitate a just and expeditious resolution
- Rules are to be applied by the court with the objective to avoid undue delay, expense, and compliance with rules
- There has been some case consideration as to how the power to amend/case management generally is to be applied to comply with rule 5
- Summary: old approach was allow the amendment, and make the party seeking the amendment pay the costs thrown away. But, as this is only a partial remedy (will never recover full costs thrown away), and amendments made – particularly in the course of a trial – disrupt the court and other litigants - a new approach has been adopted.
- ***State of Queensland v JL Holdings*** **HCA** – let anything slide
    - In Fed court in Qld. Keifel J as trial judge had control of pretrial proceedings (equiv. of SC supervised case list).
    - Trial date had been set some time ahead of particular application to amend. Amendment would have introduced new issues for the hearing.
    - Judge concluded that if amendment was made, then the lengthy period for trial, dates of which had been set, would have to be forsaken
    - As a result, her honour refused amendment.
    - HC allowed the amendment. Basically said that while case management principles were a relevant consideration, they could not be used to prevent a party from litigating an issue which was fairly arguable
    - Parties should be permitted to raise an arguable defence provided any imposition to other parties could be compensated by costs.
- ***AON Risk Services Australia Ltd v ANU*** **HCA –** no lets be reasonable (Keifel now in HC)
    - On the 3rd day of a 4wk trial, the P applied for an adjournment for leave to amend its statement of claim to add a substantial new claim
    - Question: should that amendment be permitted or refused and the matter allowed to proceed on the pleadings as they stood?
    - Surmised the old view which was allow the amendment, and make the party seeking the amendment pay the costs thrown away. But this is only a partial remedy, will never recover full amount of costs thrown away
    - Further, when an amendment is made like this in the course of a trial, it disrupts the court and other litigants in the court suffer
    - What the HC in this case recognized was that those matters were very relevant considerations
    - The new rule was stated (using the equiv. ANU rule 5):

- [93] *Rule 21(2)(b) indicates that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the court and upon other litigants. In* ***Sali v SPC Ltd*** *Toohey and Gaudron JJ explained that case management reflected:*
  - *"the view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard…"'*

- So basically, if you try and amend once trial has started it's unlikely to be allowed

RULE 5 AS A SWORD/WEAPON

- ***McCracken v Phoenix Constructions*** **(2013) Qd R 27** – para 55
  - A party put the other party to proof on issues which were only designed to delay and complicate the proceedings without having any direct relevance to the ultimate resolution of the case. In consequence, a particular costs order was made to (in effect) compensate the innocent party for being put to that unnecessary expense
- ***IMB Group v ACCC*** **(2007) 1 Qd R 148**
  - A claim has to be served within 12 months of it being issued, if not, have to go back to the court and get an order renewing the claim so it can be served; ordinarily no trouble with serving ACCC (very high profile). The plaintiff in this case deliberately withheld serving the ACCC because it was wanting to gain some tactical advantage by having a proceeding alive but not having to actually argue it in court. The CoA relying on rule 5 said this was contrary to the philosophy of the rules – can't start a proceeding and just sit on it, so as a consequence they refused the renewal of the claim (death to the proceedings)

2 Applications

Can apply to amend documents, see above.

Rule	Application
69	Joinder
116	Substituted service
161	Further and better particulars
162	Strike out
188	Withdrawal of admission
223	Disclosure
250	Inspection of property
257	Injunction
260A	Freezing Order/Mareva Injunction
261A	Search Order/Anton Pillar Order
280	Dismissal for want of prosecution
281	Default judgment
292/3	Summary judgment
370	Failure to comply with rules
371	Failure to comply with orders

377	Amendment of originating process
389	For want of proceedings
670	Security for costs
	Stay
	Lift a stay

Generally

- Rule 31: a person making an application in a proceeding must sign the application, file it, must be in approved form, must name respondent, and must be served
  - Approved form – Form 9
- Rule 32: permits oral applications
  - But will then require proper application & supporting affidavit to be filed in certain time and then set a date for a further hearing on the matter
  - This allows other side to be fully appraised of all matters^
- Rule 390(a): evidence for rule 31 application to be given by affidavit
  - Rule 390(a) – at trial for matter started by claim, evidence must be given orally
- General practice run down
  - Applicant puts in an affidavit
  - Respondent replies with an affidavit
  - Matter comes before judge
  - Order made, this order must now be complied
  - Note usually take under 2 hours, if more may be moved to general list

Affidavits

- Rule 430: Contents of affidavit
  - (1) Confined to evidence person making it could give if giving oral evidence
  - (2) If applying for default or relief other than final relief, then solicitor can write affidavit on information and belief if source for such is stated (i.e. my client informed me)
- Rule 431: Form of affidavit
- Rule 432: Signing requirements (every page)
- Rule 433: Certification in cases of inability to read or physical incapability to sign
- Rule 435: Exhibits
  - Must be filed at same time and be endorsed that it is the doc referred to
- Rule 440: scandalous or oppressive matter in affidavit
  - Court can order for removal

A Joinder

Adding parties once proceedings have commenced

- Rule 69(1)(b) – can make an order to add people even if proceeding has commenced (**interlocutory application**) if:
  - Presence is necessary to enable proper adjudication
  - If presence in court is desirable, just and convenient to enable the court to do justice
  - ***News Ltd v Australian Rugby League*** – if court order made in proceedings has a <u>direct</u> or <u>indirect but consequential</u> effect on the rights of this person, then this person should be joined to the proceedings

- ***Interchase Corporation Ltd v FAI General Insurance*** – convenience alone is not enough. Note, was decided under old rules which did not include 'desirable, just..' allowances, so may be more lenient now

- What if you're trying to add another D/R after the limitation period has expired?
  - Rule 69(2) – must not include or substitute a party after LP except for very limited grounds
  - Rule 74(5) – for the purpose of the LP, a proceeding by or against the new party is taken to have started when the OG commencement of proceedings started
    - But ***Althous v Australian Meat Holdings*** – said that r 745) was sig. because it allows court to control prejudice that applies to a new D or R if after expiry – so courts will consider was is in interests of justice, does it prejudice D? That type of thing
- Also look to rule 376
- Note if the court makes an order adding or substituting party, under rule 69(3) can make directions about future conduct of proceeding

Service Note

- Rule 74(1) - If an **order** is made changing or affecting the identity or designation of a party, the P or A must file an amended copy of the originating process within time specified in the order (if no time specified, 10 days).
  - Basically, if you've added someone look to rule 74, it explains all the stuff that happens now someone new has been added
  - Eg. Start of proceeding date for new D/R (day amended OP was filed) - 74(4)
- If an **application** is made to adding or substituting a party, then applicant must be served on all existing or relevant parties and that person
  - E.g. if adding D or R – r 70(2)
  - E.g. if person dies, disabled, or becomes bankrupt – r 72(4)
  - E.g. if P or A dies – r 73(3)

INTERVENTION

- Note court has inherent power to allow a person to intervene in a proceeding per ***Levy v State of Victoria*** **(HCA)**
- Brennan CJ at 601: "It is the nature of that jurisdiction that it should be exercised in accordance with the rules of natural justice. Accordingly, its exercise should not affect the legal interests of persons who have not had an opportunity to be heard. Therefore, a non-party whose interests would be affected directly by a decision in the proceeding – that is, one who would be bound by the decision albeit not a party – must be entitled to intervene to protect the interest liable to be affected."
- "Where a substantial affection of a person's legal interests is demonstrable (as in the case of a party to pending litigation) or likely, a precondition for the grant of leave to intervene is satisfied. Nothing short of such an affection of legal interests will suffice."

B Orders to Protect Property Rights

Ch 8: Protecting rights and preservation of property

R 250: Inspection Order

- Rule 250(1): court may make an order for the inspection, detention, custody or preservation of property if:
    - The property is the subject of proceeding; and
    - Inspection is necessary for deciding the issue in the proceedings
- Note, court has to be satisfied that there is a substantial and genuine dispute, and it is appropriate to make the order, and that inspection of the property would facilitate proof
    - So it is not a given/likely court will make a 250 order
- Rule 250(3): sets out what the order may permit a person to do
    - Note an order for experiment may be given even if it will affect a small portion of the property
- The court may make ancillary orders in relation to various costs etc.
- Note, in **urgent circumstances** a party can get an order under r250 before proceeding starts (order may require party to then commence proceedings in certain no. of days)

Injunctions

- Part 2, Chapter 8
- Can be prohibitive, can require party to preserve property, can require party to do something (mandatory injunction – rare)
- Basically apply using law of equity – it is preserved – r 257
    - Need some sort of uniqueness – land will always be unique, otherwise need to show some distinguishing features that warrant preservation of SQ
    - Injunctions are an equitable remedy that preserves SQ until matter is resolved.
- Can be interim (ST) or interlocutory (until trial or other order) – r 259

Disclosure

- Note, when applying (particularly for an *ex parte* application) there is a **heavy onus** to make full and frank disclosure of all relevant matters
- ***Williams v Kim Management*** is authority
- Barristers Rules & Solicitor's Conduct Rules require solicitor and client to fully disclose all material relevant to the issue
- Must therefore also disclose material that is negative (why not to grant)
- If you fail to disclose then can be readily dissolved on application of other party

Costs

- Note, for an injunction, the price for obtaining it will be the giving of a worthwhile taking as to damages
- This means that ultimately it should be found that the injunction was not reasonable imposed, the client would be liable to compensate the other party for any losses incurred as a result of the granting of the injunction (can be quite substantial)
- Therefore, quiet a serious consideration to have and should inform & consult with client

The next 2 orders are types of injunction, but they are on the rare side

R 260A: Freezing Orders (Mareva Injunction)

- These prevent frustration of court process by freezing the parties assets within the jurisdiction – r 260A
- Freezing order would restrain the respondent from moving any assets located in or outside Australia or from disposing, or dealing with, or diminishing the value of those assets
- Equitable origins from UK – to ensure D did not dispose of assets so as to create a situation where a judgment could not be satisfied

R 261A: Search Orders (Anton Piller Orders)

- **R 261A** Court may make an order in any proceeding (or in anticipation of any proceeding) for the purpose of securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is, or may be, relevant to an issue in the proceeding or anticipated proceeding
- **R 261B** sets out what court must be satisfied of in order to make such an order
- R 261E – must appoint an independent solicitor to oversee enforcement of order
- Very expensive and complicated procedure
- It is rarely relied on, but is for those rare cases where it is essential to obtain information from a computer, for example.
- More commonly used in Fed Court because dealing with trademarks, copyright and the like – in those situations it is often more relevant to obtain info the AP way
- But more often than not, inspection pursuant to r 250 will satisfy your needs

R 272: Appointment of Receiver

- Court has general power to appoint a receiver for management – r 272
    - Note that *Corporations Act* is separate to application of rules around this, so for those situations leave it to the CA
- Court can authorize a receiver (either in receiver's name or in the name of a party) to do anything the party might do if without legal incapacity – 272(2)
- An 'interested person' can **apply** to the court for them to give directions – r 272(3)
- R270 - Receiver must keep accounts and the like of property placed in the receiver's custody and pass them on to the parties and court as required
- Why would they do this?
    - Usually ancillary to the major litigation
    - I.e. appoint receiver and manger to hold the SQ prior to the trial and final resolution of matters in issue between the parties

C Security for Costs (Rule 670)

- Key concern: whether the P is considered to be impecunious and unable to satisfy an order for costs if unsuccessful in the litigation
- R 670: on **application by D**, the court may order the P to give the security the court considers appropriate for the D's costs of and incidental to the proceeding
    - Note, if P is corporation, *Corporations Act* gives power to court to make an order for security in appropriate cases
- R 671: <u>prerequisites</u> for security for costs order

- Must be able to bring the matter within one of the paragraphs of r671 before it is entitled to get an order for security

- R671: discretionary factors for security for costs order
  - Court in deciding whether to make the order, may have regards to the means of those standing behind the proceedings, prospects of success on the merits, genuineness of the proceedings…
- R 673: if security is ordered to be given, it must be given in the form the court's order directs
- R 675: must meet deadline for giving security, otherwise stay or dismissal
  - Where the court orders that security be given and within a particular time, if security is not given under the order, the proceeding is stayed so far as it concerns steps to be taken by the plaintiff, and the court may (on the D's application) dismiss all or any of the proceedings
  - Often court can make a hatchet order
    - This is where order requires that if the required step (payment is not made within certain time, then proceedings stand dismissed (so other party can just file judgment)
- Rule 675: court may set aside an order on appropriate terms
- ***FAI General Insurance v Southern Cross Exploration*** **(HCA)** – this changes the position on hatchet orders. For a long time it was thought that if time ran out on one this was the end of the matter. But this decision provided that given the SC has power to extend time at any time, even though that time has lapsed, the court still has the power to extend the time for complying with the order and set aside, in effect, the default judgment
  - Was based on NSW case, but similar enough rules to Qld for it to apply here

D Streamlined Proceedings

- Part 8 (start at r 442) allows for streamlined proceedings – which effectively means the exchange of correspondence between solicitors can be used instead of relying on an affidavit
- This procedure applies to (per r 443):
  - An application for further and better particulars
  - An application for an order because of failure to comply with the rules
  - An application for an order because of failure to comply with an order
  - Any other application relating to a failure to comply with an order or direction of the court
- How does it work?
  - Solicitor can write letter to the other side setting out brief statement of the relevant facts, why the applicant should have relief
  - Other side then has **3 days to reply** and indicate their attitude to application
  - The respondents reply must (per **r 445**) set out what it proposes to do in response to application
  - If exchange does not lead to a resolution, then an application is made to the court under **r 447**
  - The court then determines the matter basically in light of what was in the exchange of correspondence
  - Note, court can still ask for affidavits to be filed if they feel it is necessary

Application for further and better particulars (r 161)

- A party may apply to the court for an order for further and better particulars of the other party's pleadings

Application for directions (Chapter 10, Part 1)

- Rule 366: court may give directions about the conduct of a proceeding at any time
- 366(4): a party may apply for directions either on an application made for the purpose or on application for other relief
- 367 'Directions' also relevant
- (More discussion of this above with case management section)

Failure to comply with rules (r 371) (Chapter 10, Part 2)

- Rule 371: failure to comply with rules; apply under rule 372 (this is a streamlined proceeding)
- This is an *irregularity* and does not render proceeding, document, step taken or order made in a proceeding a nullity
- If there has been a failure to comply, then look to **371(2)** for what court can do
  - (Basically not necessarily fatal but judge has broad discretion)
- Further, innocent party has to apply to get an order to be made (r 372)
- Application must set out in detail the way in which there has been non-compliance with the rules (r 372)
- NOTE – can't set aside proceeding because started by incorrect OP – r 373

Failure to comply with orders or directions (r 374) (Chapter 10, Part 2)

- Rule 374
- Can still be punished by court for contempt – 374(2)
- Similar discretion allowances etc. for 371

3 Ending Proceedings Early

A Default

Defendant in Default

- Plaintiff can **apply** for default judgment (interlocutory application)
- Rule 281
- This can occur if they do not file their notice of intention to defend within the requisite 28 days
- Central to prove: service has been effected, and effected *in accordance* with the rules
- The rules then go on to deal with the way in which default judgment can be given in particular types of claims (detailed in table below)

Rule	Name	Information
283	Money Claim	Simplest and most straightforward Can give a judgment on this (283(3)) - sue for x dollars; P does not defend; Judgment can be entered for the plaintiff in the amount sought (rule 283) Amount: is up to the amount claimed, with interest (283(2)(a)) at the rate claimed or as under section 58 CPA; and costs (283(2)(b))
284	Non-liquidated damages	Example: breach of contract, where you can't quantify the amount of what the damages are

		284(3) permits the registrar again to commit to the judgment, but conditional on Chapter 13, Part 8 for the assessment of damages.
285	Detention of goods	285(3) Registrar can give the judgment, 285(2) the registrar can give judgment for the return of the goods OR for the value of goods (to be assessed under Chapter 13, Part 8) and costs
286	Recovery of possession of land	Again, registrar can give judgment Can be fore recovery of the land (286(2)(a)) And for costs
287	Mixed claims	Claim for money sum and return of goods; or claim for a money sum that is liquidated, and a money sum that is not (2) P may seek and obtain judgment in same way as provided for under the earlier rules about those types of claim
288	Other claims	'Wash up provision' E.g. account of profits (more complex than assessing damages) In these circumstances, the plaintiff must apply to the court for judgment to a judge - 288(2)
289	Costs only	This gives Registrar residual power with respect to costs Provides that if a D satisfies the Ps claim but not as to costs, then the registrar can enter judgment for costs (289(3))

Plaintiff in Default – Want of Prosecution

- Defendant can **apply** for default judgment (interlocutory application)
- Rule 280
- Also relies on rule 389
- Main concern: failure to prosecute the action which they have started
- The D or R in the proceeding may apply to the court for an order dismissing the proceeding for want of prosecution
- Note, inherent jurisdiction of SC aligns with this:
    - Inherent jurisdiction of the Supreme Court to dismiss a proceeding for want of prosecution
    - S 22 of the *Civil Proceedings Act 2011* (Qld) in relation to the relevant power of the District Court and Magistrates Court
        - 2 year limitation in s22 is not seen in r 280 and does not apply to the Supreme Court's jurisdiction, but there is a requirement that a plaintiff take a step in the proceedings once every two years or else leave to proceed with the proceedings is required
    - Policy objective of this inherent jurisdiction and s 22 CPA is found in rule 5(4): 'the court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.'
- ***Cooper v HopGood & Ganim* [1998] QCA 114** – McPherson J (at 17) - ordinary members of the community are entitled to go on with their lives and plan their affairs without continuing threat of litigation and its consequences hanging over them
- **Onus?**
    - On the party making application to show proceeding ought to be struck out

WHEN WILL COURTS STRIKE OUT?

- Courts are not likely to strike out for want of prosecution.
- Require:
  - A lapse of years – not just days or months – to get an order under this rule
  - Need to show systemic delay in prosecuting the litigation
  - The two year limitation in the CPA for the lower courts is an indication of the period of time required
- ***Birkett v James*** **[1968] AC 297** – in this case it was held that for a D to obtain this order, they had to show that:
  - The Plaintiff delayed with intention and contemptuous or insolent,
  - The delays gave a substantial risk that there would not be a fair trial of the issues in action, or

    That the delays were likely to cause or have caused prejudice to the defendant.
- Fair trial point raised is significant
  - Must show some evidence about the fair trial point – concerned with things like availability of witnesses (fading memory); availability of documents etc. that make it more difficult for a defendant to respond to allegations and claims made by the Plaintiff much further down the track than form when the cause of action was accrued
- Fair trial point also came up in ***Cooper v Hopgood & Ganim***
  - As of 1998 when the application to dismiss for want of prosecution was made, it was held the claims had still not been properly pleaded despite the proceedings having commenced in 1994 regarding event occurring as early as 1987
  - incus JA (at 10) – 'It is desirable that litigants and their lawyers be given to understand that the Court will not necessarily countenance such a long delay in achieving a formulation of the allegations on which the action is based. The delay should in my view be treated as inexcusable.'
- Court will consider **<u>several factors</u>** in both an application for want of prosecution and for leave to proceed under rule 389 (2 year limitation), see case below
- ***Tyler v Custom Credit Corp Ltd & Ors*** **[2000] QCA 178** Atkinson J (at [2]) lists twelve factors to take in to account in determining whether the interests of justice require a case to be dismissed. These include:
  1. How long ago the events alleged in the statement of claim occurred and what delay there was before the litigation was commenced
     a. *Department of Transport v Chris Smaller (Transport) Ltd* [1989] 1 AC 1197 at 1207-8
  2. How long ago the litigation was commenced or causes of action were added
     a. *Cooper v Hopgood & Ganim* at 120
  3. What prospects the plaintiff has of success in the action
     a. *Keioskie v Workers' Compensation Board of Queensland* CA No 46 of 1992, 15 September 1992 at 2-3 per McPherson J; *Cooper v Hopgood* at 124
  4. Whether or not there has been disobedience of Court orders or directions
     a. *Cooper v Hopgood & Ganim* at 121.
  5. Whether or not the litigation has been characterised by periods of delay
     a. *Birkett v James* [1978] AC 297 at 322-3.
  6. Whether the delay is attributable to the plaintiff, the defendant or both the plaintiff and the defendant
     a. *Holmes v Civil & Civic Pty Ltd* CA No 15 of 1992, 14 September 1992; *Lewandowski v Lovell* (1994) 11 WAR 124.

7. 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
    a. *Hoy v Honan* at 3 per Derrington J, at 7 per Fitzgerald P.
    b. Might that the Plaintiff can't afford to prosecute the action; but will be more lenient if their financial difficulty is caused by the actions of the Defendant
8. Whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim.
    a. Court will be less likely to strike out proceeding if the Plaintiff could simply recommence new proceedings (e.g. strike out application is within limitation period)
9. How far the litigation has progressed
    a. *Keioskie v Workers' Compensation Board of Queensland* at 10.
10. 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 (*Campbell v United Pacific Transport Pty Ltd* [1966] QD R 465 at 473, 475). Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers
    a. *Gleeson v Brick* [1969] Qd R 361 at 369
11. Whether there is a satisfactory explanation for the delay
    a. *Campbell v United Pacific Transport Pty Ltd* at 437-4
12. Whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial
    a. *Witten v Lombard Australia Ltd* at 412
    b. *Cooper v Hopgood & Ganim* at 118, 124

- So if making an application, need to address these factors to the extent that they are relevant (generally there should be something to be said about each of them). In affidavits is where you deal with this.

Setting Aside Default Judgment

- Rule 290: provides mechanism by which a D can apply to set aside a judgment entered by default
- Two categories of ways in which these applications are dealt – it depends on the way in which judgment was entered against D in first place:
    - (1) Where judgment is obtained *regularly*
    - (2) Where judgment is obtained *irregularly*

1 Regularly Obtained Default Judgment

- Factors are as follows (***Aboyne Pty Ltd v Dixon Homes Pty Ltd* [1980] Qd R 142**):
    - (1) Whether the D has given a satisfactory explanation of its failure to appear (defend the proceedings)
    - (2) Any delay in making the application to set aside default judgment
    - (3) Whether the D has a prima facie defence on the merits

      (Don't have to satisfy each of these factors.)
- In ***Evans v Bartlam* [1937] AC 473**, which was cited in ***Cook v DA Manufacturing Co Pty Ltd* [2004] QCA 52** – Lord Atkin at 480:
    - "The discretion is in terms unconditional, the courts however have laid rules to guide them in the normal exercise of their discretion."
- So it is discretion but the court has overlaid some principle in practice to help parties understand their prospects of having such judgment overturned
- <u>Factor 1:</u> requires a very compelling reason why the D didn't, when had the opportunity, defend the proceedings

- Where regularly obtained judgment, can presume it has been served properly so need better reason than "I didn't know about it."

- Factor 2: any application should be made promptly. Need to prosecute this application expeditiously. Any delay in making this application also has to be explained.
  - Must also be shown that the other party (P) won't suffer any prejudice by reason of any delay in bringing the application to set aside the default judgment
  - Prejudice might be something which can be cured by costs order, and the courts will consider that. But the state of affairs might have moved on such that it is very hard for the plaintiff to put things back as they were to allow the D to defend the original action
- Factor 3: in ***National Mutual Life Association of Australasia Limited v Oasis Development Pty Ltd*** **[1983] 2 Qd R 441** Justice McPherson said:
  - [at 449] "Speaking generally, it may be said that it is the last of these considerations that it is the most cogent. It is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the plaintiff."
  - ***National Australia Bank Ltd v Singh*** **[1995] 1 Qd R 377** expressly approved that the third proposition, namely that a defendant with a good defence absent prejudice the plaintiff, it would be an extraordinary case where they were prevented from bringing forward that defence and bringing it forward to trial
- Practical point
  - When applying, D will have to identify what their defence is – will need an affidavit of what their defence is – good way to do this is include form of defence plan to file as an exhibit to affidavit

2 Irregularly Obtained Default Judgment

- Starting proposition: to obtain default judgment the P must strictly comply with all of the rules relating to the filing and service of the claim, as well as all the rules relating to the judgment in default – ***Ezi-Frame Pty Ltd v Al-cote (Aust) Pty Ltd*** **[1982] Qd R 602**
  - E.g. if personal service required but posted and relied on such service to get DJ
- Case example: ***Elders Finance Limited v Invaway Pty Ltd,*** **unrep. 19 September 1990, QSC**
  - Case where the affidavit of service was irregular
  - It was relied upon to obtain the default judgment
  - What was irregular about the affidavit of service was contained hearsay evidence (not allowed then, now allowed)
  - So the default judgment was set aside on the basis that it was irregularly obtained because it did contain hearsay evidence which was not ok back then

Costs of Default Judgment

- If D is successful in obtaining an order to set aside default judgment regularly entered, usually the D will be required to pay the P's costs in entering the judgment and the application to set aside
- However, if it is an irregularly obtained judgment, the position is different and will often depend on the circumstances

- Any orders to set aside default judgment will include procedural direction about the filing of a notice of intention to defend, and a defence. As well as procedural steps to get on with the conduct of the litigation

B Summary Judgment

- Once D has filed notice of intention to defend,
  - Can be sought by the plaintiff – r292
  - Can be ought by the defendant – r293
- Test: whether opposite party has **no real prospect of success** & no need for trial
  - Rule 292(2)(a) P must show that the Ds defence discloses no real prospect of the D being able to defend all or part of the Ps claim
  - Rule 293(2)(a) – similarly a D must show that the Ps claim discloses no real prospect of success

(a) No Real Prospect of Success

- ***Deputy Commissioner of Taxation v Salcedo*** – rules:
  - Should be applied using their clear and unambiguous language, and keeping in mind the purpose of the UCPR to facilitate the just and expeditious resolution of the real issues in civil proceedings at the minimum of expense
  - Nothing in the UCPR, however, detracts from the well established principle that issues raised in proceedings will be determined summarily only in the clearest of cases
- ***Agar v Hyde*** **(2000) 201 CLR 552** the high court majority said:
  - 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… a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way
- ***Spencer v Cth*** **241 CLR 118** – the words "no reasonable prospect of success" or there equivalent, must be applied given their actual context in the particular case
  - No reasonable prospect of success has been understood as meaning "not fanciful"
- ***Deputy Commissioner of Taxation v Salcedo***
- ***Foodco Management Pty Ltd v Go My Travel Pty Ltd***: the test is of no real prospects of success, and not that of no real probability of success
- ***Swain v Hillam*** (on UK equivalent)
  - The words 'no real prospect of success' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success. The words direct the court to the need to see whether there is a realistic, as opposed to fanciful prospect of success.
  - As to the purpose of the rule, it saves expense. It achieves expedition. It avoids the courts resources being used up by cases where this serves no purpose. And I would add, generally, it is in the interests of justice.

(b) No Need for Trial

- Court are unlikely to enter summary judgment because won't likely prevent a party from placing their case before the court and having it dealt with before trial
- Need for trial in summary judgment application context was discussed in ***Gray v Morris***:

- In the application of the plain words of rules 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at trial.

- ***Deputy Commissioner of Taxation v Salcedo***:
  - Summary judgment will not be obtained as a matter of course, and the judge determining such an application is to determine whether the respondent to the application has established some real prospect of succeeding at trial. If that is established, then the matter must go to trial.
- Fundamental point – most litigants will get their day at trial

4 Gathering Information

A Basic Disclosure Obligations

- Starting Point: Rule 209 – Application of disclosure rules. Applies to:
  - (a) Proceedings started by claim
  - (b) Proceedings in which court has made an order under r 14 ordering the proceeding to continue as if started by claim
  - (c) if the court directs – a proceeding started by application
    - ***Warrata Coal v Nichols*** – proceeding started by originating application. Specific disclosure ordered to assist with justice. If it's not super fact intensive then can suitably tailor the order to keep it confined

General duty of disclosure – rule 211

- Party has duty to disclose each document that is:
  - (a) in their possession or under their control
  - (b) directly relevant to allegation in issue in the pleadings
  - (c) if there are no pleadings, directly rel to matter in issue in proceedings
- Document is defined in *Acts Interpretation Act* – Sch 1. Includes:
  - Any paper or other material on which there is writing
  - Any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them
  - 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 device)
    - Ergo not limited to paper, can include computer records
    - ***Menken v Wintour*** **[2006] QSC** This includes computer backups
    - ^This creates problems – can have server or operating system updates /changes such that records may not be able to be reinstated in a cheap or efficient way (prohibitively expensive)
    - Court management has specified directions regarding disclosure of computer backups for this problem
- How long does duty go on for?

- Rule 211(2): continues until the proceeding is decided, so it is an ongoing duty
- So even though might be direction from judge that parties are to exchange list and copies of docs by a certain date, and parties do it, disclosure is not yet done – a party can identify a doc that is disclosable, other party needs to disclose that

- In Possession or Under Control?
  - Control – expands it to include docs held by third parties which first party control (e.g. their accountant, or lawyer (subject to privilege))
  - Note cannot avoid need to disclose docs simply by removing docs from your possession
  - ***British American Tobacco Aus Services Ltd v Cowell***
    - Court at first instance – no doubt doc retention policy had some administrative purpose and benefits, but satisfied that the primary purpose of the new policy was to damage/destroy (?) earlier records
    - Be sure no active process of getting rid of docs that would otherwise be kept or maintained
    - Overturned – CoA said it was not admissible to manage docs – document retention in place long before the litigation and so were documents long before the litigation (would have been different if there is a closer time frame)

DIRECTLY RELEVANT TEST

- Directly relevant to an allegation in issue? – r211(1)(b)
  - ^THIS IS THE TEST
- Directly relevant – ***Robson v REB Engineering*** – something which tends to prove or disprove the allegation in issue
- ***Mercantile Mutual Custodians v Village/Nine Network Restaurants & Bars*** **[2001]** – if not directly relevant it need not be disclosed. Not enough to hold the opinion that it is "reasonable to suppose that the document contains information which **may** – not must – either indirectly or directly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary"
  - So requirement is docs must be *directly relevant* to pleadings, can't do the train of inquiry test done in other jurisdictions (this requires disclosure of docs which might lead you in direction about case which may become relevant – lower bar)
- Partly relevant, partly irrelevant docs?
  - Generally speaking, should disclose whole document (e.g. board minutes where discuss litigation for a little while, but not whole meeting – all in)
  - ***Telstra Corporation v Australis Media Holdings*** – recognized that although this is starting point, court has discretion to determine if whole doc really does need to be disclosed. In exercising this discretion, <u>consider</u>:
    - Whether part of doc ought to be excluded from disclosure
    - Whether exclusion of that part will or is likely to detract from understanding of the bits that do satisfy criteria
    - Is it apparent that there are substantial privacy interests that ought to be given protection
- Allegation in issue in the pleading?

- Rule 211(3): allegation remains in issue until it is admitted, withdrawn, struck out, or otherwise disposed of

B Exceptions

- Rule 212
- Primary exception – 212(1)(a): docs in which there is a valid **claim to privilege** from disclosure (no. of types). Main ones:
  - Legal professional privilege
    - ***Asahi Holdings Proprietary Limited***
    - Key concern: whether doc was given for primary purpose of legal advice; most common way to waive it is by referring to content of advice in communication with other party
  - Without prejudice privilege,
    - Real test: is communication a genuine attempt to compromise a dispute between two parties?
  - Also privilege against self incrimination (only for natural persons; not corps); parliam
  - Rule 213: provides mechanism for **challenging privilege claim**.
- Rule 212(2) – concerns disclosure of expert reports; provides that they are not privileged from disclosure

C Methods of Disclosure

- Rule 214: Disclosure by delivery of list of documents and copies
  - Per 1(b), other party can request copies of docs in the list other than those subject to privilege
  - Form 19 must be complied with. Failure to do so leads to cost consequences
  - ***Central Queensland Mining Supplies v Columbia Steel Casting***
    - Sometimes there is a tendency for parties to make it hard for the other side – disclose it in a way that makes it hard and time consuming to sort through all the docs
    - Also, such over-inclusion means the cost is transferred to the other side because it saves the party having to properly analyse each doc
    - Whole point of list is to put docs in logical order and properly described so can more easily make sense of it
  - Timing – (2)(b) list delivered within **28 days** after close of pleadings
    - For complex litigation, time frame usually changed pursuant to an order under (2)(a)
  - Originals or copies?
    - Copies ordinarily suffice – r 214(1)(b)
    - But r 215 – party can request an original to be produced for inspection
- Rule 216: disclosure is to be given by inspection of documents
- Rule 217: talks about how to inspect to make it a smooth process
- Rule 223: talks about court orders relating to disclosure

- Rule 224: power of court to relieve parties of their duties of disclosure
  - Broad powers to tailor a disclosure regime appropriate to the case
  - Contemplates that court can make orders to relieve parties to an extent of their duty to disclose
  - (2) sets out relevant considerations; (d) provides a catach all
  - This rule underpins more limited orders about disclosure
    - Most common forms of limited disclosure is for disclosure to be made by categories – rather than disclose EVERY doc relevant to issue in pleadings, can get orders for only certain categories of docs be disclosed
  - Whole point of this is to make disclosure as efficient as possible; but also to make sure that the docs are actually relevant and the parties have all the info they need – no one is at a disadvantage (underpinned by Rule 5)
  - Supervised Case List (the big matters) – Document Plans
    - Most common order – don't have to go through computer backups
    - Plan demonstrates what will be regarded as reasonable search/what to search etc.
    - Details electronic doc management like Ringtail
- Rule 221: docs relating solely to damages do not have to be disclosed unless requested by the other side
- Rule 222: mechanism designed to enable a D party, or counterparty, to plead to allegations in a pleading put against them
  - Request can be made for docs to be provided at an early stage so D can plead with knowledge of those docs
  - Can allow D to tailor their defence to relevant material (so don't have to change it post-discovery)
- Rule 225: consequences of not giving disclosure
  - Practically – doc can't be used in proceedings
  - Can be liable for contempt, ordered to pay costs or part costs, consequences for solicitor personally for docs that ought to have been disclosed but weren't

D Ethical Obligations

- Solicitors have obligation to ensure client is properly informed of disclosure obligations
- Solicitor must be satisfied client has complied with obligations
- Prior to commencement of trial, rule 226 requires solicitor to provided certificate to court that they advised client of consequences of non-disclosure (usually by way of sending letter to client)
  - Setting out obligations and what need to do to comply
- Before sign certificate, write a letter; in case anyone takes issue with your own conduct you can point to this letter
- If solicitor is aware that client is not complying, solicitor has some options that culminate in withdrawing from the matter

E Obtaining Documents from a Non-Party

- Rule 242 'Notice requiring non-party disclosure'

- If docs not held by either party (e.g. need evidence of market prices), then require non-party disclosure
- Same test for disclosure of parties to proceedings – directly relevant; AND
- What a subpoena would ask for – "that is a document the respondent could be required to produce at trial of the matter"
- Rules tend to be strictly enforced by court – because you are bringing someone who is not involved in the litigation and making them do stuff

- Rule 243 'form and service of notice'
  - Have to tell third party WHY docs are relevant
- Can third party object to disclosure?
  - Rule 245 – yes, can object
  - Rule 246 – object stays notice
  - Rule 247 'court's decision about objection'
    - Court has discretion to make the order they consider appropriate
    - Note courts discretion as to costs under 247(3) is to be used in consideration of the subsections of 247(4)
- Rule 249 'costs of production
  - Third party entitled to reasonable costs and expenses for producing docs; includes copying costs and costs for searching docs

Subpoenas to Produce

- Rule 414
- How do you get one?
  - Request made to registrar of court
  - Registrar will issue a subpoena with a form attached to request
    - Note subpoena must contain adequate description of doc or thing required to be produced – r 414(8)
    - It must also set out rights of respondent to apply for it to be set aside
  - This is then served to appropriate person
- Once served, what happens?
  - Recipient (now a respondent for this issue) is required to comply with ir, or apply to have it set aside (in its entirety or in part)
    - Rule 416 says court can set a subpoena aside
- Setting aside a subpoena? Grounds:
  - Objection for want of relevance
    - Test is one of apparent relevance (on the face of the proceedings)
  - Objection for possession
    - If got a good explanation of why they can't comply e.g. docs destroyed or don't hold docs as per corporate restructure
  - Objection based on oppression

        - Takes too long, too expensive, too hard
        - Court is not too sympathetic to this (they do get costs covered)
        - But if search of dos is disproportionate to likely utility in litigation, and if recipient of subpoena is of such limited means, it may be oppressive
    - Privilege
- Not grounds:
    - Commercial confidentiality
    - ***Satntos v Pipeline Authority of SA***
    - One it is shown that the subpoenaed documents may throw some light on the matters in issue, then "the risk to the confidentiality of the documents (subpoenaed) must be tolerated in the interests of the administration of justice" – ***Alliance v Australian Gas Light Co***
- Rule 19: Conduct Money
    - Amount to enable subpoena recipient to bring docs to court (e.g. taxi); general costs thingie is about *production* of docs, this is about actually appearing in court
- Non-compliance is contempt of court

Finishing it Up

1 Alternative Dispute Resolution

There are several different forms of ADR, the main ones are explored below

A Mediation

- Voluntary process
- Varying degrees of formality
    - Can have barristers and solicitors briefed on behalf of parties that attend, can therefore be very formal in how it runs
    - Can also be very informal, where the parties themselves attend before the mediator (two ends of the spectrum)
- Non-binding outcome
    - Only binding if it is agreed to be binding
- Without prejudice
    - So get without prejudice privilege for all the happenings in the mediation
    - Although, if a settlement is reached then it should be recorded in a deed or agreement of settlement (that is then disclosable)
    - Parties are free to make offers and concede points for the purposes of mediation of which those positions they are not bound to stick to
- Each party bears its own costs
    - Do not have the risk that litigation has of having a costs order against you
    - BUT do have to pay for the costs of hiring a room, the mediator which are things the court system usually covers
        - Note most mediators have standard form provision that each party pays 50% of the costs

Role of Mediator

- The mediator cannot impose a binding outcome; they can guide though and point to the particular strengths or weaknesses of cases
- Does not give any indication of any merits with regards to disputes/proceedings
- Mediator's role is limited, except in a court ordered mediation

    - The court may require that the mediator provide a certification that the parties properly engaged in the mediation process (not telling how it went, what happened, just that attended and engaged with the spirit of the mediation)
    - ^Rule 331
- Also look to rule 326

Triggering the Process

- Contractual agreement
    - Dispute resolution clause in it
    - Common – if can't resolve between selves w/in 10 days, refer to mediator
- Voluntary agreement
    - Parties have a dispute between themselves and have the idea that may be worth trying mediation to resolve
- Court order
    - Rule 319: (1) the court may direct the registrar to give written notice to the parties that the parties' dispute is to be referred, by order, to an ADR process to be conducted by a specified mediator or case appraiser (r323(1)(a))
    - Rule 320: the court may also refer a dispute in a proceeding for mediation or case appraisal – (a) on application by a party; or (b) if the proceeding is otherwise before the court
    - So if the other side refuses to mediate, can **apply** to court

Formal Steps

- Agreement as to identity of the mediator
    - For a voluntary process, rules do not describe any way this should be done
    - One is appointed by court if court ordered
- Appointment of the mediator
    - Most mediators have formal mediation agreements that appoint them
    - This will also usually have a clause to release them of liability
- Pre-mediation conference
    - Usually done by telephone between solicitors and mediator
    - Discuss how the mediation will go – e.g. bundle of docs, where should be, what needs to be read, will there be opening statements, how long it will take
    - This is an important step for achieving settlement as it ensures it occurs in structured way
- Position Papers
    - Common for parties to create a position paper which summarises each parties positions with regards to the matters in dispute and what they say about the respective strengths and weaknesses of their own case, and the respective strengths and weaknesses of the other side's case
    - ^Helps focus the mediation to the key issues
    - Alternative to position paper is to deal with those matters in the opening statements at the mediations
- Following opening statements, parties can go to separate rooms and mediator goes and sees them individually. Mediator will work out respective appetites of parties around settlement etc.

Mediation Reaches Settlement?

- A written document of what has been agreed should be prepared
- Usually requirement that parties be represented by someone who has authority to settle and sign such an agreement

Note, mediation is the most common ADR. It also provides a useful incentive ususally for reaching a settlement so can be quite effective.

B Expert Determination

- This is a form of resolution process that is entirely a creature of contract
- Generally will therefore have contract on foot between parties that requires disputes (potentially of certain nature) to be referred to an expert
    - Note contracts can have multiple expert determination provisions
- Purpose: refer matters in dispute to a person that has specific expertise in the area that the dispute is about (e.g. construction dispute, refer to engineer)
- Can be mandatory, depending on the contract
- Problems?
    - Where it goes a bit more problematic where the dispute is referred to an accountant expert for an engineering matter – can set aside the dispute because the person it is referred to does not have general expertise in the area to determine this dispute
    - So when drafting the referral clauses, great care has to be given to what it is the parties are seeking to achieve and making sure the type of dispute is appropriate for the type of expert that is to be referred

Appointment of Expert

- Contract usually sets out how this is to be done, how to be identified, mechanism for deadlocks
- The expert, like the mediator, will have a retainer agreement that releases them from liability and so forth
- One way parties try to delay expert determination processes is to delay or refuse to sign those expert determination agreements, so when drafting your provisions have regard to this

Distinguishing from an Arbitration

- Often these processes closely resemble each other
- Fundamental different – arbitrator must undertake process in a judicial way whereas expert can inform themselves in any way they wish, including relying on their own expertise
    - Judicial way – hear evidence, make finding with ref to evidence and submissions put before them (see quote below)
- ***Northbuild Constructions Pty Ltd v Discovery Beach Projects*** **[2008] QCA 160** - "The judicial process, normally, if not invariably, requires the adjudicator to determine the dispute on the basis of evidence placed before the adjudicatory by the parties. The judicial process does not contemplate a right on the party of the adjudicator to make his own independent investigations."

Procedure

- Some published guidelines, but not necessary to follow them
- Often involves submissions being made
- Expert can ask questions, so can ask for clarification.

- Can also request oral hearing of the matter
- Witness statements can be used
- Can sometimes involve cross-examination (unusual; more judicial)

Binding/Appeal Rights?

- The determination is generally binding (could not be in contract)
- There are limited or no appeal rights
    - Generally an expert who has the requisite expertise that makes a determination, that determination can only be upset or deferred in instances of fraud, cannot be appealed or overturned by reason that the expert got it wrong

C Arbitration

- Makes a determination like a judge would have to in a court proceeding. It is binding.
- Domestic – *Commercial Arbitration Act 2013* (Qld) (uniform legislation)
- International – *International Arbitration Act 1974* (Cth)
- It is a creature of contract that is supplemented by statute
    - Can opt out of statute provisions if desired
- Limited appeal rights – s 34 CAA
    - Note these have been further limited with the new CAA
    - But at least more than an expert determination
- Private process
    - One of its greatest advantages, often why chosen
    - Not in open court and is not publicly filed (as opposed to an ever more public process where all court docs are now uploaded to SC library)
    - But, do have to pay for everything that would otherwise have been provided by the State e.g. court report, rooms, arbitrator
    - Competing interests – privacy vs. costs

Appointment of Arbitral Panel

- Deadlock process needed if can't agree, one is provided under the legislation
- If even number of arbitrators, also need deadlock process for when arbitrators do not agree
    - Can appoint a chair (expensive to have them sit the whole time tho), can also appoint an umpire – cheaper alternative to chair

Procedure

- Parties can agree on procedure – s19(1) CAA
- Directions can be made by the arbitrator – s 19(2) CAA
- Directions can be enforced by a Court if not complied with – s 27B CAA
- Ability to issue subpoenas – s 27A CAA
- Costs – s 33B CAA
- Enforcement of award – ss 35 & 36 CAA
    - Can be enforced in same way as court judgment

Disclosure

- Section 27A CAA
- Can apply to court for subpoeanas for third parties

- But must get leave of arbitral tribunal – s27AA(2)
- To get such leave will need to show docs are relevant

- Once permission granted, need application for leave to the court – slightly different from a subpoena for docs for UCPR proceedings where you can just go to the registrar and do it all
  - Need judge's leave and then go to the registrar for the subpoena
  - Can be subpoenas for docs or for attending as a witness, or both
- Relevance Test: one of apparent relevance
  - Do not need to show direct relevance
    - To get permission from arbitrators, for leave to go before court, for leave of judge to issue subpoena, or on an application by third party to set aside subpoena
  - ***Xstrata Queensland Limited v Santos & Ords*** [**2005] QSC 323,** McMurdo J: "Documents must be apparently relevant in accordance with the authorities"
  - ***Apache Northwest Pty Ltd v Western Power Corporation*** **(1998) 19 WAR 350**
  - ***Alinta Sales Pty Ltd v Woodside Energy Ltd*** **[2008] WASC 304**
- Return date of docs?
  - Unlike position in court proceedings where it's the case that subpoenas should only be used for seeking production of documents for a trial of the matter, this is not the case in arbitral proceedings because there is no analogue to non party disclosure – so can have a return date much earlier than the first day of arbitral proceedings – ***Xstrata v Santos***

D Negotiation and Settlement

Negotiation Strategies

- Offers to settle – offers under the rules: see rule 353
- Offers to settle – ***Calderbank*** offers (***Calderbank v Calderbank*** **[1976] Fam 93**)

Offers to Settle

- Rule 353
- Timing (r 354)
  - For a matter that involves a jury (rare in civil), anytime before a verdict is granted
  - In any other cases, any time before final relief is granted (so up until judgment delifered)
- Offer is without prejudice
- An offer does not need to be filed or brought to the attention of the judge until the decision has been finalized and it becomes relevant to costs

Rule 360: where plaintiffs make an offer

- Where P makes an offer that is not accepted and obtains an order that is no less favourable then D is to pay Ps' indemnity costs unless D can show an alternative solution

Rule 361: where defendants make an offer

- If D makes an offer and outcome is no more favourable to the P than the offer, then D must pay the P's costs up to date of service of offer at a standard basis; and
- P must then pay D's costs from the date of service of offer at a standard basis

Calderbank Offers

- Similar in effect to offers under the UCPR
- Framed in that without prejudice saves as to costs
- Where there is a jurisdiction that does not have rules like Qld, can make a *Calderbank* offer instead and it will have similar effect
- Also, if in Qld proceedings that have not been commenced at court such that UCPR has not been triggered, can rely on *Calderbank* offer

Documenting Settlement

- Settlement agreement/settlement deed
    - Should record include amount of settlement, who is to pay the settlement, when to be paid, what happens if not paid on time, how proceedings on foot are to be dealt with
    - Terms of release
    - Any indemnity between parties with regards to fresh proceedings
    - Bar to any future proceedings
- Orders discontinuing the proceedings
- Rule 310 – an earlier discontinuance is not a bar to fresh proceedings
- Consent judgment
    - Thought to be a greater protection than a discontinuance to fresh proceedings being brought
    - Should all be recorded in a settlement agreement no matter what is done

2 Costs

This is costs post litigation when outcome of proceeding is known (along the way can have various applications where costs are dealt with in different ways)

- Look to Chapter 17A UCPR; s 15 *Civil Proceedings Act*
- Purpose: provide some monetary compensation to the successful party for having to bring/defend litigation
- Scope: can only recoup costs for costs incurred in term of **legal costs**, so not internal costs (even not in-house lawyers)
- Will not usually recover the whole of what was paid for the prosecution or defence of proceedings: ***Cachia v Hanes*** – won't see complete indemnity, no compensation for loss of time, not allowed costs for attending etc. At best it is partial indemnity
- Forms:
    - Standard Basis (party on party)
    - Indemnity Basis (solicitor on client costs)

A When Will Costs be Ordered?

- General rule about costs: r 681
  - 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
  - ***Oshlack v Richmond River Council*** **HCA**
- Event?
  - To be read distributively
  - ***Interchase Corporation v Grosvener Hill*** – if there are more than one issue in the proceedings, does not suggest a regime where the costs are to be determined for each event, but rather one order for all of those events
- Successful party?
  - Difficulty where a proceeding might be such as to lead to a result where although a P was successful in a litigation, the recovery they achieved was no really as to manifest success
  - ***Alltrans Express v CPA Holdings*** – after 15 day trial, P was successful as a matter of law (made out all of its claims), but on the question of quantam were only awarded judgment of 2 pounds
  - ^Extreme example, but shows that where the P is only notionally successful (when compared to what was sought), the court can exercise its discretion
- Factors to be considered when considering discretion
  - ***Deeson Heavy Haulage v Cox (No 2)***
    - Ds were successful parties in proceedings in terms of orders made as the net benefit to P was minimal
    - P guilty of misconduct
    - D succeeded on significant number of issues litigated, of which those issues were several and took up considerable time
- Rule 682: court can make costs order at any stage of proceeding or after proceeding has come to an end
  - Engages with the fact that there are interlocutory steps where issues of costs need to be dealt with.
- Examples of interlocutory costs orders include:
  - <u>An order just for costs</u> means that the party pays all the costs of the application on the standard basis
  - <u>Costs in the proceedings/costs for the cause</u> – the costs in the interlocutory step just become costs of the proceedings, so the person who is successful in the proceedings just get the costs for the application paid for too on the standard basis
  - <u>Costs in any event</u> – party who's favour the order is made is to get costs on standard basis but not until proceedings have come to an end. Qualifications depend on outcome of litigation
  - <u>Costs of appeal –</u> self explanatory
  - <u>Costs thrown away</u> – will be made where the party acts in a way that means costs incurred by their opponent have been wasted (e.g. case changed, parts abandoned, sought late adjournment of hearing/trial)

        - It was thought that this would cure delay
            - ***AON Risk Services v ANU*** changed this opinion though
    - No order as to costs – self explanatory – no one gets their costs dealt with
    - Reserved costs – rule 698 – an order by which during the interlocutory stage, the court may reserve the costs – no decision made now, because often not clear until further steps taken whether or not that application was necessary or fruitful with regards to the applicant who made it
    - Rule 684 – court can make a costs order for a particular part of the proceeding; so don't necessarily have to have costs follow the event, can deal with a certain part before it's all over

Procedural Stuff

- Must serve costs in approved form – Form 60A
    - Rule 705 sets out requirements for the content of costs statement
- Once cost statement served, recipient has **28 days** to reject any bits of it
- Beyond that, the party who has served the costs statement may apply for the costs assessment – in practice, **cost assessor is appointed**
- Rule 720: permits costs assessor to decide the procedure to follow
    - (2) Sets out some considerations to have as to appropriate procedure
    - (4) Sets out some things the assessor can get done
- Rule 721: sets out what cost assessor must have regard to when assessing costs

B Standard Basis Costs Order

- Rule 702
- This is the starting point.
- It aims not to punish an unsuccessful party, but rather to provide a reasonable level of reimbursement for a successful party for the costs they incurred

Costs Actually Expended

- BUT must have actually expended the costs in order to recover them
- ***Howard v Mechtler*** – must be costs actually paid
- Can be an issue for some cases
- E.g. insurer running the case for the insured – running the litigation and expending the money, but it will be the named insured that will have the costs order named in their favour
    - Courts have long since recognized this is a practice in the insurance industry that ought to be accommodated for
    - ***Johnson v Santa Teresa Housing Association***
- Also issue in no win no fee retainer agreements with solicitors
    - Courts have recognized this now exists
    - ***Wentworth v Rogers*** – it was held where this retainer arrangement exists, costs can still be recovered on the basis that usually
        - Do have legal obligation to pay costs

- Observed that the partial indemnity principle should be applied flexibly rather than made as a rigid rule

What Costs are Allowed on a Standard Basis?

- Determined by reference to a scale of costs – schedule 1 UCPR, Supreme Court, District Court and Magistrates Court have scales
- Permits recovery on a per item of work basis, timed amounts
- In standardizing the costs that are allowed to be recovered in that way in a sense creates a parity between parties who have used more or less expensive lawyers
- **Rule 702(2)** – when assessing the costs on a standard basis must allow all costs that are necessary or proper for the attainment of justice in the matter
    - Words '*necessary and proper*' subject of much debate
    - ***Hennessey Glass and Aluminium v Watpac Australia*** – leading case
        - Necessary if litigation could not have been carried on reasonably without them
        - Proper if it s reasonable for the costs
        - No reasons to read the rules in a restrictive sense (this started the trend to being more lenient, before that bare minimum approach taken)
    - So, examples of what would be *necessary and proper* include:
        - Briefing senior counsel
        - But briefing more than one counsel (Jnr & Snr)? Debated

C Indemnity Costs Order

- Rule 703
- Test of reasonableness?
    - ***Bottoms v Reser*** **[2002]** – De Jersey J test of reasonableness
        - Receiving party will be given the benefit of the doubt
        - So considerable liberality should ordinarily be extended in assessing reasonableness.
        - If the costs warranted characterization as outlandish, they ought no doubt nevertheless to be excluded

When Conduct Warrants Such Order?

- For this order to be made the party must have conducted the litigation in a way so as to justify a more punitive costs order to be made
- ***Colgate Palmolive v Cussons*** provides some examples:
    - Making allegations of fraud known to be false (need to be specifically pleaded because serious allegation to make)
    - Misconduct of the litigation which causes loss of time for court or other parties e.g. change case close to time of trial
    - Commencement of proceedings for an ulterior motive or other commercial advantage to apply pressure to a counter party
    - Commencement of proceedings with disregard for known facts and established law

        - Note costs order can be made personally to solicitor now too – of acted w/out client's instruction or knowledge that otherwise had no foundation
    - Making allegations that ought never have been made
        - E.g. causes case to be sidetracked by matters that are of marginal relevance and marginal consequence in the proceedings but which take up a long time in proceedings
    - An imprudent refusal of an offer to compromise (offer to settle penalty)

3 Enforcing Judgments

A Money Orders

- Rule 794 – general power to enforce money order
    - A money order is any order that requires the payment of a specified sum of money, together with interests and costs (most usually) from a D to a P
    - Note that as enforcement occurs once judgment been handed down and all the assessments have been done, this part can apply even for claims that may have started out not being for a specified sum
- Rule 797 – amount recoverable from enforcement
    - Costs and interest can be recovered as part of the order; interest continues to accrue up until the judgment amount is paid
- Rule 799 – enforcement period
    - Can commence enforcement proceedings without leave within 6 years after the money order was made

Finding the Money

- Rule 807 – statement of financial position
    - When getting money order, require party owing the money to complete and return a statement of financial position
    - This identifies where the D's assets lie, where sources of income exist, where other debts are
- Rule 813 – enforcement hearing
    - This allows person to be examined about their assets
    - I.e. if the SoFP does not appear to be fulsome could be a good reason to conduct an enforcement hearing
    - E.g. if don't declare property they own but a register search shows they own it
    - Or if property has been moved – can put people under oath and ask them questions to find out where the money is (to the extent there was money in the past and now it's gone)
- Rule 814 – orders at enforcement hearing
    - This provides what the court can do at an enforcement hearing
    - The purpose of the hearing is essentially to have an enforcement warrant issued

Enforcement Warrant – what can you get

- Rule 828 – seizure of property under enforcement warrant

- Warrant can require or authorize an enforcement officer to seize and sell property in satisfaction of a money order
- Rule 840 – debts that may be redirected under enforcement warrant
  - Warrant can authorize the redirection of moneys payable to the debtor, and in this way start recovering debt from income sources
- Could also get a combination of both these^ e.g. if real assets sold do not satisfy owed amount
- Rule 848 – warrant can get redirection of moneys deposited into financial institutions
  - E.g. if regular deposit made on behalf of the person by a third party into a bank
- Rule 868 – can get orders for payments by installment

B Non-Money Orders

- A lot of proceedings brought where P is not seeking the payment of a particular sum of money – whether liquidated or to be assessed
  - E.g. proceeding return of property, transfer of shares, declarations of rights under contract (require someone to do something or stop doing something)
- R 891 – general power to enforce non-money orders
- A key thing about enforcing non-monetary orders – the court's power to hold someone as in contempt of the court come in to play here
  - It is a criminal prosecution for failure to comply with an order of the court (jail)
  - The failure to comply with a judgment order of the court is contempt
  - The court does not exercise those powers often or lightly, and there are other ways of enforcing non-money orders

Special Types

- R 896 – special provision for an order for possession of land. May be enforced by:
  - Enforcement warrant under r 915
  - Seizing property of person liable under the order under r 917
- R 898 – orders to perform or abstain from an act (orders other than land transfer)
  - (2)(a) – punishment for contempt available
  - (b) Property can also be seized if that is an outcome that will assist with the enforcement of the order
  - (c) If respondent to order is a corporation, then officers of the corporation who might be seen to be standing in the way of compliance can be punished for contempt or their own property seized

4 Trials

- Rule 390: proceedings started by a claim are determined at trial (applications go to hearings)

A Evidence

- Evidence is received orally; does not mean all evidence is to be given orally
  - Can give evidence in the form of a verified statement of the witness
  - In major commercial matters statements can be many volumes
  - Now can hand up those big volumes, run witness through summary of statement, then go in to more detail – gets better testimony

- Also new ways to take evidence – rule 392: video, telephone, or other remote means

Views as Evidence?

- Rule 480: may get any demonstration or something about any question that arises
- A view has the purpose of enabling the judge, tribunal or jury, to better understand the evidence; it does not, without more, constitute evidence itself
- ***Scott v Numurkah Corp* (1954) 91 CLR 300:** Case where there was noise on the dancefloor – did the level of noise constitute a nuisance? The HC distinguished between a view strictly so called and a demonstration. If it is to be a demonstration, then both parties must agree that the demonstration exactly replicates what happened at the time in question (only if there is this agreement then that demonstration can constitute evidence)

B Jury

- Trial may be judge alone, or with a jury
  - Note can't have jury for motor vehicle litigation
- If jury asked for, trial by 4 person jury – so all findings of fact are on them
  - These will be put into the form of specific questions put to them at the end of the trial that they must answer – could be up to 40 or 50
  - Recommended? Have to be careful, usually with defamation cases
- Can a party renege after asked for trial by jury?
  - Case where the party has not paid the jury fees, then it is incumbent on the party that asked for the jury to pay the statutory fees
    - Can the P say I can't afford that I don't want a jury – cases suggest can't get out this way
  - Lots of case law on this that is hard to reconcile

C What is Someone Doesn't Show Up?

- Rule 476: if D does not appear when trial starts, P may call evidence to establish an entitlement against the D as the court directs
- ***Bank v KH*** – P sued bank and another party for a substantial sum of money. Bank put in a defence raising a limitation defence (brought outside limitation period). Bank then went into liquidation and no appearance of the bank at trial. Judge gave judgment for the P against the Bank. The liquidators of the bank then appealed all the way to the HC and the HC allowed the appeal, pointing out that what the judge had to do on the non-appearance of the bank was to *determine the matter in the light of the pleadings*
  - The pleadings had formalized the dispute between the parties
  - The pleadings had raised the limitation defence, and that meant that before jdugment could be given in favour of the P in absence of the D, the judge had to be satisfied that the limitation defence was no good
  - The problem was that the limitation defence was unanswerable
  - So the HC set aside the judgment and the bank succeeded
- So must prove case for judge in light of pleadings, have to meet defences

D Subpoenas

- Subpoena directed to a person to provide documents to the court at the hearing – if have this, then the person in answer to that subpoena will be called upon to enter court, does not take the oath, merely responds to a question that they are the person to whom the subpoena was directed and produces docs to court
- If court and parties satisfied that the docs are thereby produced, that person is now excused – so that person does not become witness at trial

E Self-Representation

- The judge cannot be overly partisan, cannot conduct the case for the self-litigation
- But the judge does have an obligation to assist the litigant in person by indicating the appropriate procedure that should be followed and the like
- If you find that you are a lawyer for a party and the opp party is self-rep, then you do have a number of issues that you have to consider:
    - It can be of assistance to indicate to the other side without jeopardizing own party's case what the other party should do procedurally in the matter – can only help overall, but be careful

McKenzie Friend: Basically a friend, can be a lawyer but doesn't have to be - a friend who is there to help and give advice. Relatively rare, but it is a procedure that does arise here and there

5 Appeals

- Any right of appeal is created by statute
- Some basis for appeals are as follows:
    - Appeal as to supervisory jurisdiction only (only ground of appeal is that the decision appealed against was beyond jurisdiction)
    - Appeal on a question of law only
    - Appeal in the strict sense, where the appellant court can only give such judgment as ought to have been given in the first instance – in this case, the law is applied as at the time as the original jurisdiction (so any subsequent amendments are irrelevant)
    - Appeal by way of re-hearing – the matter is determined on material before the first court, but in the light of the law as it stands at that date (so if been a statutory amendment, then the law to be applied is the law at the later time)
        - Most common
    - Appeal day no ho – often the case with an appeal from mags to district court where there is in effect a full re-hearing of the matter, look at it all fresh

6 Abuse of Process

- Rules exist which enable the court to strike out a claim, a whole of an affidavit, paragraphs of one, or even the claim itself, if it is considered to be vexatious, oppressive, or unsupported by law.
    - Rules 16, 171, 389, 389A, 371, 372, 374, 440 etc.
- In addition, court still has inherent power to deal with issues of abuse of process

- ***QNI Resources v Sino Pacific*** – Statement of Claim was attacked as disclosing no cause of action. Judge came to conclusion that statement of claim itself claimed no viable cause of action. Was not clear power to strike out pleading went to claim itself.
    - BUT if brought second proceedings this would be an abuse of process
    - If brought an action and it has been dismissed and failed, and going around and starting the same process again is an abuse of process
- Courts have resisted and even warned against laying down hard and fast definitions in the abuse of process realm – cannot be restricted to defined categories; must reflect contemporary value
- Abuses of process usually fall in to three categories
    - Illegitimate
    - Unjustifiable
    - Bring administration of justice into disrepute

7 Contempt of Court

- One of the basis on which a party can seek redress where there has been a failure to comply with a court order or an undertaking is the procedure for contempt
- Rule 925

Process & Consequences

- Starts with an application that sets out the basis for the contempt with an affidavit setting it out
- Goes before the judge, if judge satisfied the person is in contempt by failing to comply with order, then it can make an order for the arrest of the contemptor
- Can provide that the person is held in jail until such time as contempt is purged

Usage: Often it will be a procedure for where someone has failed to vacate premises or hand over property – last resort, can be used to secure order though