



School of Law & Business

LWZ317 Civil Procedure

Lecture Notes

Topic 6 – Setting Down, Case Flow Management, Trial, Subpoenas

Reading:

Cairns, *Australian Civil Procedure*, 8th Edition: chapters 2, 15, 16

Place of trial - Order 47

- R [47.01](#) and R [5.08](#)[1] - plaintiff selects.
- R [5.08](#) [2] – if no selection then Darwin
- R [5.08](#) [3] - same for proceedings commenced by originating motion.
- R [47.01](#) - Court may order change

- R [47.04](#) - Trial of separate issues
- R [47.05](#) - Court action at end of separate issue

Supreme Court trials - held either in Darwin or in Alice Springs.

- R [47.01](#) - Court may order a change in the place of trial selected by the plaintiff.

Considerations for change of venue:

(a) Place where cause of action arose, witnesses:

Ryan v Harrison (1957) VR 210.

O'Brien v Scott (1900) 6 ALR(CN) 45

Kings Cross Whisper Pty Ltd v O'Neill (1968) 2 NSW 289, 290

(b) Local cases should be tried locally:

Hansen v Border Morning Mail Pty Ltd (1987) 9 NSWLR 44

Cording v Trenbath (1921) VLR 163

Moyle v Elliot (1937) 54 WN (NSW) 104

Kings Cross Whisper Pty Ltd v O'Neil (1968) 2 NSW 289

(c) The nature of the case

(d) The residence of the parties and witnesses

(e) The general possibility of not having a fair trial.

Hansen v Border Morning Mail

Wilson v Syme (1880) 6 VLR (L) 200

Lehtonen v Australian Iron & Steel (1963) NSW 323.

Mode of trial

- Mode of trial R [47.03](#) - no jury unless Court orders otherwise
- Jury - s7[4] *Juries Act*
- Prima facie all proceedings shall be tried without a jury R [47.02](#)
- *Nationwide News v Bradshaw* (1986) 41 NTR 1

Relevant considerations:

(a) the nature of the cause of action;

(b) whether the proceedings is politically sensitive and the court should be protected from inevitable uninformed criticism;

- (c) whether the case will be one of strongly conflicting evidence - hard swearing;
- (d) the desirability of involving the public in actions against public instrumentation;
- (e) the public importance of the case;
- (f) whether one or more of the parties is unrepresented.

Nationwide News v Bradshaw (1986) 41 NTR 1

Hart v Wrenn and ABC (SCNT Unrep ruling Mildren J 18/10/94)

McDermott v Collien (1953) 87 CLR 154

Henry v Commonwealth (1937) ALR 409.

Trial of separate questions - R 47.04

R [47.04](#)

Applicable principles:

- (a) the question must be a question which in the absence of an order under R47.04 would be determined as part of the trial of the proceeding
Burns Philp & Co Ltd and Anor v Bhagat (1993) 1 VR 194;
- (b) the determination of the question must bear on whether a party is entitled to the relief which he claims in the proceeding or in the extent of the relief.
TVW Enterprises Ltd v Duffy (No 3) (1985) 62 ALR 63, 64;
- (c) question can be isolated from other questions in the proceeding and its determination may finally determine the proceeding as a whole, or where facts can be agreed and the sole question is one of law.
Blurton v Minister for Aboriginal Affairs (1991) 29 FCR 442
- (d) the question may be a question of fact or law;
- (e) the procedure is not appropriate where:
 - (i) the result must depend on the impact of detailed and complex findings of fact or principles of law which are themselves flexible, so that there are too many variables to admit of a clear cut solution in advance
Allen v Gulf Oil Refining Co Ltd (1981) AC 101
 - (ii) it involves a question of law which is dependable on findings of fact which could only be made at trial
Gardiner v Henderson & Lahey (1988) 1 Qd R 125, 132;

- (iii) (iii) the question is a hypothetical question
Swift Australia Co (Pty) Limited v South British Insurance Co Ltd
(1970) VR 368 p 369.
- (f) a question identified under r 47.04 for separate trial must be stated with particularity
Rajski v Carson (1988) 15 NSWLR 84 at 88
- (g) Judicial discretion, must be sufficient reason for exercise of discretion.

See also R [47.05](#)

Case Flow Management: Order 48

Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corporation
(1991-1992) 27 NSWLR 567, 571 D-E

Order 48 is divided into 4 parts, namely –

Part 1 – Preliminary

Part 2 - Case Flow Management

Part 3 – Setting down for trial

Part 4 - Directions Hearings or Listing Hearings by Videoconference or teleconference

Part 5 – Miscellaneous

Part 1 defines various terms and establishes the extent of the application of the order.

R [48.02](#)(1) provides that the order applies to all proceedings in the court commenced by writ and to all proceedings in respect of which an order has been made under R [4.07](#).

R [48.02](#)(2) provides that the order may apply to proceedings commenced by originating motion if it is proposed to call oral evidence or if it appears desirable for any other reason.

Part 2 - Caseflow Management:

Caseflow management rules have been implemented in just about all Australian jurisdictions as a response to the phenomenon of extreme cost and delay occasioned when parties are simply permitted to make their own unsupervised decisions as to the pace of proceedings, what interlocutory proceedings are needed etc. Caseflow management rules differ from jurisdiction to jurisdiction, but in general terms are designed so that a Judge or Master takes control and supervision of all matters (usually from the date of close of pleadings but in some cases earlier) and gives all necessary directions on an ongoing basis to ensure that the matter gets to trial as expeditiously as possible consistent with fairness.

Order 48 of the NT Supreme Court Rules is a fairly typical example of a caseflow management system, but must now be read in light of the rather more radical provisions of Practice Direction 4 of 2004 - [Litigation Plan](#) and Practice Direction 6 of 2009 - [Trial Civil Procedure Reforms](#).

R [48.04](#) initial Directions hearing

R [48.06](#) – Categorizing Proceedings

R [48.08](#)(1); [48.08](#)(2) – Master retains control of category A, B & E proceedings;

R [48.06](#), [48.07](#), [48.27](#) - self executing orders;

R [48.12](#) – Settlement Conference

Part 3 – Setting Down for Trial

R [48.16](#) – Listing Hearing. R [48.17](#) – Listing for Trial

R [48.18](#) – Matters to be considered before listing for trial.

R [48.18](#)(3) Certificate of readiness

Part 4 - Directions Hearings or Listing Hearings by Videoconference or Teleconference

Part 4 makes provision for the exchange of witness statements, for videoconferencing and for self-executing orders where a party fails to comply with an order of the court. Videoconferencing is a facility which is frequently used by litigants in the Northern Territory because of the remoteness of Darwin and Alice Springs.

R 48.28 – Experimental Rules:

Practice Direction 4 of 2004 - [Litigation Plan](#)

Practice Direction 6 of 2009 - [Trial Civil Procedure Reforms](#)

Federal Court of Australia – Practice Note No 30: Fast Track Directions – now see [practice notes page](#) –especially No 6 – [electronic technology in litigation](#); No 8 – [FastTrack Directions](#).

For further discussion of case flow management see:

- Justice D A IPP, 'Reforms to the Adversarial Process in Civil Litigation - Part 1' (1995) 69 ALJ 705;
- Justice D L Mahoney, 'Delay ... A Judge's Perspective' (1983) 57 ALJ 30
- P Haynes, 'Planning and Executing a Delay Project' (1983) 57 AU 24;
- I R Scott, 'Is Court Control the Key to Reduction in Delays?' (1983) 57 ALJ 16.

Setting down for trial

Listing hearing: R [48.16](#)

Certificate of readiness: R [48.18](#)(3). See forms 48B and 48C of Supreme Court Rules Matters to be considered before listing for trial: R [48.18](#)

Pretrial directions hearing before trial judge: R [48.22](#)(3)

NB These rules especially need to be read in light of Practice Direction 4 of 2004 - [Litigation Plan](#).

Trial: Order 49

Order 49 deals with the following matters:

- (a) order of evidence and addresses, R [49.01](#);
- (b) absence of a party, R [49.02](#);

- (c) adjournment of trial, R [49.03](#);
- (d) death before judgment, R [49.04](#);
- (e) certification of associate, R [49.05](#)

See Bernard Cairns, *Australian Civil Procedure*, 8th Ed pp 564 - 568.

Protean Holdings Ltd (Receivers and Managers Appointed) and Others v American Home Assurance Co (1985) VR 187, 189-192.

Order of evidence and addresses

The usual order of evidence and addresses is:

- plaintiff opens the case
- plaintiff calls witnesses;
- defendant opens
- defendant calls witnesses
- defendant makes submissions in law and evidence
- plaintiff makes submissions in law and evidence
- defendant has a right of reply on the law.

The order for the calling of evidence is not fixed and may vary depending upon which party has the legal burden of proof of an issue: see *Protean (Holdings) Ltd (Receivers and Managers Appointed) and Others v American Home Assurance Co* [1985] VR 187, 189-192. This determines who goes first under rule 49.01(2). The burden of proof is not always on the plaintiff. It may be reversed by statute (for example, certain statutory presumptions). It can also fall on a defendant where the defence is in the nature of a “confession and avoidance”, such as where a defendant admits a plaintiff’s claim for debt but alleges in defence a set-off, counterclaim or satisfaction and accord.

Subrules 49.01(4)-(6), which govern the orders of address are expressed in very complex terms but is really expressing a simple concept. That is, if the party going second does not call any evidence, then that party gets the tactical advantage of having the final say in making submissions on the facts.

Adjournment: R [49.03](#)

Stewart v Gladstone (1877) 7 Ch D 394

Ord v Ord (1923) 2 KB 432, at 439

Biro v Lloyd (1964—5) NSW 1059 at 1062

Maxwell v Kenn (1928) 1 KB 645 at 653; (1927) All ER Rep 335 at 338 - 9

R v Foster; Ex parte Isaacs (1941) VLR 77 at 88
Bloch v Bloch (1981) 37 ALR 55.

The impact of a case flow management is that courts are becoming more reluctant to grant adjournments. See *Sali v SPC Ltd and Anor* (1993) 67 ALJR 841 where the High Court held that in determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties. An adjournment will be granted where the Court is satisfied that the party applying will suffer serious prejudice if the adjournment is not granted and if the other parties will not suffer prejudice that cannot be cured by award of costs.

R [49.04](#) - death before judgment

SUBPOENAS

Order 42 - See Bernard Cairns, Australian Civil Procedure, 8th Ed pp 525 - 531.

R [42.02](#) - Court may order person to attend trial or produce documents.

Forms 42A, B, C, D R42.03[1] - order for attendance made by filing of subpoena

R [42.05](#) - Service - personal service on person. Corporation

R [42.06](#) – Production - can produce the document or thing to the Court prior to trial

R [42.04](#) - Court may set subpoena aside

R [42.11](#) - expenses and loss

Subpoena may be set aside if it is oppressive.

Grounds:

1. requires a stranger to extensively search through the documents to find what is required
2. subpoena is vague, obliges stranger himself to decide what documents are relevant
3. subpoena must not be expressed so that it in effect seeks discovery

Witness v Marsden (2000) 49 NSWLR 429, 440 – 442

Commissioner of Railways v Small (1938) 38 SR (NSW) 564

R v Saline [1989] 16 NSWLR 14

Accused appealed against convictions. Sought production of all documents relating to offences.

Services and Execution of Process Act - Part III - s28

s9 - may be served in any part of Australia

[2] service must be effected in same way as required in the State of issue. Must contain address of party issuing.

s30[1] - service only effective if the period between service and appearance is not greater than 14 days.
