HOW TO RUN YOUR OWN COURT CASE

A practical guide
to representing yourself in
Australian courts and tribunals

{NON-CRIMINAL CASES}

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A Redfern Legal Centre Publishing book
<www.rlcp.org.au>

Published by
University of New South Wales Press Ltd
University of New South Wales
Sydney NSW 2052
AUSTRALIA
<www.unswpress.com.au>

First published 2009

National Library of Australia
Cataloguing-in-Publication entry
Author: Behan, Nadine.
Title: How to run your own court case: a practical guide to representing yourself in Australian courts and tribunals/Nadine Behan.
ISBN: 978 1 921410 83 3 (pbk.)
Notes: Includes index.
Subjects: Civil procedure – Australia.
Pro se representation Australia – Popular works.
Self help (Law) – Australia.
Civil procedure – Popular works.
Pro se representation – Popular works.
Self help (Law) – Popular works.
Dewey Number: 347.94

Design Josephine Pajor-Markus
Cover iStock
Printer Ligare

This book is printed on paper using fibre supplied from plantation or sustainably managed forests.

Note for the reader
While every effort has been made to make the information contained in this book as up to date and accurate as possible to reflect the laws and the legal system of Australia as at August 2008, its contents are not intended as legal advice. Use it as a guide only and be sure to obtain legal advice for your specific legal problem.

7 Our legal system

What follows is a roller-coaster ride through our legal system. You don't need to study this too closely. Its aim is to give you, not a crash course in law, but a sketch of how law is made and the way the courts work. Use it to see where your case fits into the legal system.

Types of law

There are various types of law, for example, criminal, civil, family, commercial, international. The type of law affects the kind of remedy available, the methods used by the court, and the way the parties are treated. Here are some of the main ones.

If you are charged with an offence, the state is prosecuting you. This is **criminal law**. You are called the defendant; the other side is the prosecution. The case must be proved beyond reasonable doubt. Conviction can result in a fine, a criminal record and/or the loss of your freedom.

If you are suing or being sued, this is **civil law**. A 'lawsuit' is a civil action. Car accident compensation, for instance, other insurance claims, disputes with neighbours or tradesmen, tenancy matters, debts, consumer actions are all civil actions. The claim is usually for a sum of money and/or an order forcing or restraining particular action.

There is no single court or tribunal that deals with all civil actions. Depending on a number of factors, your case might be heard by a specialty tribunal like a Tenancy Tribunal that deals

exclusively with a particular type of civil case or else a generalist court like the Local, Magistrates or Supreme Court that deals with both criminal and civil law. The factors that determine which legal body will hear your case include which state you live in, which law is involved, which remedy you're seeking and how much money the claim is for.

With civil law, the party bringing the action is usually called the **plaintiff** or **applicant** and the party opposing it is the **respondent** or **defendant**. To succeed you must prove your case on the balance of probabilities; that is, that it is more probable than not. This is easier than proving it beyond reasonable doubt.

Family law deals with the breakdown of family relationships. It offers a range of remedies to regulate the rights and obligations of spouses, the division of their property and the care of the children. Where children are involved, their interests are considered to be paramount.

In family law proceedings the party making the application to the court is called the applicant. The other party is the respondent. Generally, the test of proof for a family law case is the balance of probabilities and not proof beyond reasonable doubt.

Administrative law deals with the bureaucracy. An administrative law action is most often an appeal brought by a party against a government decision. For example, decisions about building approvals, veterans' entitlements, immigration, government pensions and benefits, obtaining government information and receiving government housing are all administrative decisions you can appeal against. Most but not all government decisions can be appealed.

The party appealing the government decision is called the applicant and the particular government department involved is the respondent. The appeal is usually heard by a tribunal. They look at the department's decision and decide if it is the correct one. The test of proof used is the balance of probabilities.

This book is suited to non-criminal matters such as civil, family and administrative law actions.

How law is made

Our legal system comes from Britain and has developed over many centuries. It combines law made both by parliament and the courts. Parliament enacts legislation and the courts apply it and enforce it. In applying it, the court decisions interpret what the law means.

As well, over the centuries, the courts have developed abundant case law in some areas to regulate certain behaviours and redress specific injustices without the aid of legislation. This case law is called the **common law**. These cases have grown into fairly self-contained bodies of law in their own right. For example, much of our law on issues like negligence, contracts, principles of natural justice and procedural fairness is found in the common law not legislation.

Courts and tribunals use their decisions as **precedents** to guide them in the future, in similar cases. These precedents are **binding** on that court or tribunal if the case is similar enough. This means the court or tribunal is bound to follow it. The case may even be binding on other courts and tribunals.

All legal bodies are connected in various ways in a hierarchy of appeal paths that stretches up to the most powerful federal court, the High Court. Decisions of one legal body can be binding on another that is lower in the hierarchy. For example, a Supreme Court's decision can be binding on a lower court like a Magistrates Court but will not be binding on the High Court.

How the system works

Power is divided between the local, state, territory and federal governments. They each have power over particular areas of law and have their own legal bodies to apply and enforce the laws they make.

The federal government, for instance, makes law on national matters like income tax, migration, social security, family law, veterans' affairs and defence, and has its own courts and tribu-

nals, for example the Federal Court, Family Court, High Court. The state governments make law in areas like crime, roads and traffic, health and education, and have their own courts like the Magistrates Court, Court of Petty Sessions, Supreme Court. Then local governments make law about things like littering and parks and beaches.

There are some exceptions, with some powers being shared and some legal bodies shared. For example, the federal government makes law about health and education spending or, for another example, a state court may deal with your local council littering offence.

Some legal bodies deal with just one area of law, for example, the Family Court. Others deal with several different areas and are divided up internally. For instance, a state Supreme Court usually has a criminal, civil, commercial and appeal section. Likewise, the federal Administrative Appeals Tribunal has a general division and various others, like veterans, tax and social security.

The legal body hearing your case may use one or more decision-makers, but in non-criminal cases it rarely uses juries. In the lower courts, usually just one decision-maker, a magistrate, hears your case. Tribunals use one or more tribunal members. In the higher courts like the state Supreme Court, one or more judges are used. If your case is being heard in a higher court, by the 'full bench', this means three or perhaps five of its judges will be attending and deciding.

Types of legal approach

There are different approaches to the way a legal system can conduct its legal proceedings. The British, for example, use an **adversarial** approach whereas European countries use an **inquisitorial** approach. In Australia we inherited the adversarial approach from Britain, but over time aspects of the inquisitorial approach have been blended into parts of our legal system.

With an adversarial approach, the hearing is treated much

like a debate or verbal jousting match between adversaries. The parties or their lawyers present the evidence and arguments and the decision-maker listens carefully and then decides the winner.

With this model, the responsibility for the evidence and arguments is on the parties. If a party neglects to raise their best evidence or present a crucial argument then it's bad luck for them and good luck for their opponent. The task of the decision-maker in this system is to ensure the hearing is conducted properly and to decide the case impartially according to the law. Throughout the hearing, the decision-maker is often busy applying rules of procedure that govern the parties' (or their lawyer's) presentation. It is crucial for the decision-maker that the parties/lawyers adhere to the rules. A good example of this approach can be seen in the British television series 'Rumpole of the Bailey'.

EXAMPLE OF A FORMAL ADVERSARIAL APPROACH

It's almost 10 am at the busy District Court complex. Courtroom 1 is hearing the civil matters. Two half-day hearings are listed for today and the lawyers and parties for the first one are already in court waiting to begin.

The lawyers are seated at the Bar table in the middle of the courtroom facing the 'bench', where the judge will sit. The parties sit behind the lawyers in the front rows allotted for the general public. Behind the parties are a few other people who have drifted in to watch the proceedings.

At 10 am precisely the court official goes towards the front of the court to a side door and loudly knocks twice on the door then opens it and the judge enters.

'All stand, please, and remain standing,' says the court official, and the lawyers, parties and public alike all get to their feet. 'This court is now in session. Please be seated,' he says and everyone quietly sits.

One of the lawyers at the Bar table stands. 'Parker, for the plaintiff,' he says, introducing himself and then sits back down. Another lawyer rises. 'Evans, for the respondent,' she says and sits.

'Yes,' acknowledges the judge. 'Now there are some procedural matters that must be dealt with before the trial can begin. I have a statement of claim with various annexures here filed on 16 March last year.'

Parker, the lawyer responsible for the statement of claim, stands. 'Yes, Your Honour.'

'Does that raise all the issues in your case, Mr Parker?'

'Yes, Your Honour.' Parker sits.

'There is a defence, filed on 14 May last year. Does that raise all the issues in defending that claim, Ms Evans?'

Ms Evans rises. 'Yes, Your Honour.'

'Is there to be any oral evidence adduced by your party, Mr Parker?'

Evans sits, Parker stands. 'Yes, Your Honour. There is my client and also his brother. And there are the following affidavits together with the affidavits in reply.' Mr Parker lists the various affidavits by name and date then sits.

Evans stands. 'My client has various objections to the contents of these affidavits, can we deal with those objections now?'

'In a moment, Ms Evans. Do you have any oral evidence, Ms Evans?'

'Yes, my client will give oral evidence, Your Honour.'

'Very well, we can deal with your objections now.'

'In relation to the first affidavit stated by my learned friend, I refer Your Honour to paragraph 24. My client objects to this paragraph on the ground that it is hearsay.'

'What do you have to say, Mr Parker? What principle of evidence are you relying on to allow this paragraph?'

Evans sits, Parker stands. 'It is a statement, Your Honour, by my client expressing his opinion of what happened.'

'Well, objection upheld. Paragraph 24 is to be struck out.'

Parker sits, Evans stands and proceeds with more objections. 'I refer Your Honour to Paragraph 32 and make the same objection.'

'Your response to the objection, Mr Parker?'

Evans sits, Parker stands. For the next few minutes the judge, Parker and Evans deal with the various objections so that the hearing can begin.

With this done, Parker stands again. 'The court is already familiar with this matter. Perhaps we can go straight to the evidence.'

'Yes,' agrees the judge.

'I call the witness, Percy William Todd,' says Parker and the court official rises and exits the courtroom through the main door to call the first witness …

An inquisitorial approach, on the other hand, treats a hearing as an inquiry into the case by the decision-maker. The parties or their lawyers still present their case, but the decision-maker plays a much more active role in directing the case not just the procedures and is not restricted by the lawyers' or parties' presentation. The decision-maker is free to question the witnesses directly, query the evidence and arguments, interrupt the lawyer's presentation and do whatever is necessary to clear away any obstacles to making the correct decision. With this approach, a good result can depend less on the parties' (or their lawyers') presentation and more on the inquiries of the decision-maker. With a purely inquisitorial approach, the decision-maker can entirely 'run the show'. The US television series 'Judge Judy' is one example of the inquisitorial method.

EXAMPLE OF AN INFORMAL INQUISITORIAL APPROACH

The applicant, Ms Black, is appealing a Centrelink decision that she is a member of a couple, as defined by the *Social Security Act 1991*. The Social Security Appeals Tribunal is hearing her appeal. It's 9.30 am and the hearing begins with the Presiding Member introducing herself and the other tribunal members hearing today's case, to Ms Black. The hearing room is a small meeting room with a rather large table. Ms Black and the three tribunal members are all seated around the table.

'Ms Black,' says the Presiding Member, 'our job today is to take a fresh look at your Centrelink decision and to decide if it is correct. We have read the documents from Centrelink setting out the decision and their reasons for it and today we will talk to you. Then after the hearing we will make a decision and send the written decision to you. That usually happens within 28 days.'

The Presiding Member continues. 'We would like you to feel entirely comfortable and to speak freely with us about your case. We have read the statutory declarations from your family and friends that you have given us as well as the various receipts for bills. We will get to those in a moment. You have also brought your sister here for us to speak with her. She will stay in the waiting room until we are ready to hear from her. The hearing today will take approximately an hour. If you are ready we can begin.'

'Yes,' replies Ms Black.

'Now, we have a few questions for you, to help us understand the exact nature of your relationship with Mr Brown …'

Both types of approach have advantages. Understanding the differences will help you know what to expect during your litigation.

As a general rule of thumb, the older higher courts in our legal system operate using the more formal adversarial system. Courtroom procedure can be elaborate and is followed closely and the decision-maker usually remains detached as the parties present their case.

The lower courts are also adversarial, but procedure is usually less elaborate and more flexible and with their need for faster, cheaper and simpler justice, most lower courts have developed a certain inquisitorial flavour. The decision-maker is often much more active in moving the hearing along and making inquiries directly of the parties and their witnesses.

Tribunals are a fairly new breed of legal institution in Australia and some of them, like the Social Security Appeals Tribunal, are based entirely on the inquisitorial model. Others are a blend of the inquisitorial and adversarial approach, with some being more adversarial, some more inquisitorial. The federal Administrative Appeals Tribunal, for example can be more adversarial, the NSW Administrative Decisions Tribunal is more inquisitorial. Although their powers may be considerable, tribunals generally put significant effort into trying to keep hearings informal, explaining things simply and putting the parties at ease as much as possible.

If you have a choice between using a court or a tribunal to hear your case, tribunals are generally less costly and more user friendly for self-represented litigants. So it may be better to choose the tribunal.

Legal remedies

The information contained in this section is meant as background and is probably much more than you will need. However, it will give you some idea of different remedies and the rules governing them.

Generally speaking, criminal law is about penalties and civil law is about remedies. The aim of civil law is not to penalise or punish the wrongdoer but to redress a wrong in a way that restores the parties to the position they would be in if the wrong hadn't occurred. To do this, civil law has developed a range of different remedies and rules about granting them.

Knowing which remedy (or remedies) is appropriate for which wrong depends on a number of factors. The particular type of legal problem, the particular relationship between the parties, the particular legal body that will be hearing the claim and, of course, the particular wrong that has occurred all affect the choice of remedy.

Legal remedies come from a variety of sources within civil law. They come from legislation, case law and the terms of the particular agreements that parties make. Often more than one source can apply at the same time.

Legislation can spell out what remedies can be granted. For example, under the NSW *Consumer Claims Act 1998*, when determining a consumer claim, the Consumer, Trader and Tenancy Tribunal can make orders to:

- pay compensation;
- fix defects in goods or services;
- supply particular goods or services;
- return or replace goods;
- refund all or part of the purchase price;
- declare that an amount of money is not owed;
- dismiss all or part of the claim.

The *Administrative Appeals Tribunal Act 1975* is another example of law that sets out the remedies available. This tribunal reviews decisions of the federal government and section 43 of the Act sets out the Tribunal's options. It can:

- affirm the decision;
- vary it;

- set it aside and make a substitute decision;
- remit the matter back to the department, the original decision-maker, for the decision to be made again (but often with guidance about how the decision needs to be made properly this time).

Agreements between parties, like leases and other types of contracts, also often contain the remedies that a court or tribunal will enforce if that contract is breached. A tenancy agreement, for example, will set out the particular course of action open to a party for a particular breach of that agreement.

Over the centuries, case law has also developed remedies for particular wrongs as well as principles that govern the application of remedies to each case. The types of damages available and the rules for assessing damages in civil law are two important examples of judge-made law. Another example is a number of remedies found in the body of law called **equity**.

Both the law of damages and the law of equity can be quite useful but also quite complex. If you are interested in investigating either of these further, you will need legal advice. What follows is a brief description of them.

As there are various types of damages and various rules regarding their measure and availability, not all types are available in all situations. Some types are as follows:

- in personal injury cases, **general damages** are for non-economic loss like pain and suffering and loss of amenity of life, and **specific damages** are for expenses like medical bills;
- **nominal damages** apply where the wrong has been proved but no actual monetary loss has resulted. These damages can amount to as little as $1;
- **compensatory damages** compensate for the actual loss suffered;
- **aggravated damages** can apply where the injury has been

aggravated by the wrongdoer's behaviour, for example their cruelty;
- **exemplary damages** are awarded not just to compensate but to punish the wrongdoer.

In Australia, most damages awarded are compensatory. Aggravated and exemplary damages are uncommon.

There are rules, too, about the assessment of damages. For example, the loss being compensated must not be too remote from the actual wrong. Also, the person who suffers the loss has a duty to **mitigate** that loss. This means they must do what they can to avoid or minimise the extent of the loss.

The time of assessment of damages can be relevant, too. Generally, damages are calculated at a value as at the time of the wrong. Interest may also be available, calculated at a rate set by the court.

Equity is a source of remedies developed over the centuries, to prevent general injustice within the legal system. Equitable remedies are not always available and can be quite technical, but they form an important part of Australian law and have figured in many of our major cases. The most useful are specific performance, declaration and the injunction:

- **specific performance** orders a party to a contract to perform that contract;
- a **declaration** sets out the final state of affairs between the parties. A good example of this is a declaration that a debt is not owed;
- an **injunction** orders certain behaviour. It can require a party to do a certain act or it can restrain a party from doing a certain act. For example, when a claim is lodged at a court, between the time a claim is lodged and the date of the hearing, in certain circumstances it may be possible for an injunction to be applied for and granted to prevent a party from carrying out the offending behaviour until the case can be heard.

For administrative law, that is the law concerning the review of government decisions, legislation now largely regulates the remedies available. However, where there is a shortfall in redressing a wrong or holding an official accountable, a group of remedies called **prerogative writs** may still be granted.

Mandamus is a prerogative writ that means 'we order'. It orders a public official to carry out their public duty or else give reasons to the court for not doing so.

Prohibition is an order that forbids the public official from doing a certain act.

Certiorari orders an inferior court or tribunal or administrative body to produce a written record of proceedings to be reviewed by a higher court.

Most cases that come before our courts and tribunals involve remedies that are quite straightforward and are spelt out clearly in the legislation or the agreement made between the parties. As you progress through this book, if you are not sure of the remedies for your case or if you think there may be others available, be sure to get legal advice.