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Commencement of Proceedings (TOPIC 2):

- Having received client instructions to commence proceedings, a plaintiff's lawyer should consider numerous matters prior to filing a proceeding.

Client Management:

- Must discuss with client:
 1. Alternatives to litigation (ADR; settlement; or abandon);
 2. Process and consequences; and
 3. Legal costs and complaints handling procedure.

Letters of Demand:

- Prior to instituting proceedings, send a letter of demand to the prospective D demanding they do something (eg pay money) and briefly explain why.
 - Failure to send one, the court will penalise you with costs (unless good reason, eg limitation period).
- Often send 2 letters:
 1. aggressive, stipulating maximum amount to be claimed; and
 2. "without prejudice" written at the top, stipulating lesser amount (due to admission of fault).
 - The "without prejudice" means it cannot be used in court except in assessing costs, where it shows a genuine attempt to settle → recoup costs.
- Purpose: as a matter of practice letters of demand are written by legal practitioners in the hope of:
 - a. bringing about a speedy resolution of matters in dispute between the parties;
 - b. prompting 'without prejudice' negotiations;
 - c. revealing the strengths and weaknesses of the cases of the respective parties;
 - d. obtaining preliminary information (such as the names of insurers);
 - e. encouraging settlement.
- Whether or not to write a letter of demand is a matter of practicality, prudence, and judgment rather than a strict question of law.
 - The lawyer's overarching obligations to seek the most cost effective and speedy resolution to the matter in dispute prior to proceedings to litigation may embrace the concept of making demands of this kind.
 - In writing such letters lawyers represent clients and are not free of their ethical obligations, and should therefore proceed with due deference to their ethical responsibilities and with professionalism.
- A legal practitioner must draft the contents of letters of demand with caution as such letters may constitute misconduct rendering that practitioner open to sanction or penalty. It is, for example, unethical:
 - a. for a legal practitioner to threaten criminal proceedings in a civil matter; or
 - b. to demand payment from a person who has no legal liability to make that payment;or
 - c. to make a demand for costs which are unreasonable or excessive.

Selecting Originating Process:

- Selecting an originating process is determined by the facts to be disputed (determination of those facts) or whether it is a question of law alone.
 - If there are facts to be disputed (pleadings), the originating process is a writ.
 - If there is a question of law alone, the originating process is an originating motion (which does not call for pleadings).
- Selecting the wrong initiating process is not fatal rather viewed as merely an irregularity.
 - Choosing the wrong originating process does not mean the court will wholly set aside the proceeding: [r 2.02](#). Court's options are listed below.

Proper identification of the parties:

- The proper identification of the parties entails:
 - a. open and public justice (purpose – in public interest);
 - b. description of the parties (more than name eg corporation, share, position etc);
 - c. formal particulars;
 - d. contact details;
 - e. residential address (address of solicitor not added);
 - f. address for service; and
 - g. sufficient information to identify the cause of action (indorsement).
- Exception: Family law interacts most with Australian citizens and does not use the parties real names.

Date of originating process:

- The originating process is conclusive evidence of date and is the date of valid commencement.
- The completion of the cause of action (ie alleged wrong) must have occurred. Thus there is a limitation of action.
- The issuance of originating process is an administrative matter for registry, not a judicial matter, thereby normally the registry cannot refuse to issue an originating process.
 - However, the registry may do so where the originating process:
 - Prima facie irregularity.
 - Irregular, baseless, or vexatious (under rules).
 - Registry may refer the matter to the court for directions.

Vexatious litigants:

- Balance between pursuing vexatious litigation and preserving the litigant's access to the courts for meritorious litigation.
- [Vexatious Proceedings Act 2014 \(Vic\)](#) replaced [s 21 of the Supreme Court Act 1986 \(Vic\)](#) and commenced operation in 31 October 2014.
 - Habitually, persistently and without reasonable grounds instituted vexatious proceedings against the same or different persons: [s 21](#).
 - [Vexatious Proceedings Act](#): Supreme Court, County Court, Magistrates' Court, Children's Court and VCAT have power to deal with vexatious proceedings.
- "Vexatious application" and "vexatious proceeding" includes interlocutory application or proceeding which are considered:

- a. An abuse of the process of the court or tribunal;
- b. Commenced or pursued without reasonable grounds; or
- c. Made or conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose (s 3).
- In **Freeman v National Australia Bank Ltd**, it was held that:
 - One who took action “as a matter of course or almost automatically” and who “continues in the face of difficulty or opposition with a degree of stubbornness” may be considered vexatious.
 - Other situations where a person may be considered a vexatious litigant:
 - a. Launching an appeal in an attempt to re-litigate a final decision.
 - b. Applying to have a decision set aside.
 - c. Seeking an order restraining the enforcement of the court’s order.

Orders against a vexatious litigant:

- Litigation Restraint Order:
 - Limited (LLRO): act to prevent a person from continuing or making further interlocutory applications or specified types of interlocutory applications in a particular proceeding without first obtaining the leave of the court or VCAT.
 - Extended (ELRO): Magistrates’ Court and Children’s Court only. Prevention from continuing or commencing any legal proceedings against a specified person or other entity, or in relation to a specified matter, without first obtaining leave.
 - General (GLRO).
- Acting in concert order: prevents a person from acting in concert with a person who is the subject of any litigation restraint order. I.e. “I will help you if you take a matter to court”.
- Appeal restriction order:
 - Court or VCAT.
 - Does not affect a person’s right to make or continue another type of interlocutory application.
- Order granting leave to proceed: Pt 8 - proceed to make an application of the kind restricted by the order.
- Order varying or revoking a litigation restraint order: Pt 9 - variation or revocation of the orders.

Describing parties:

- It is essential to describe the parties adequately on the originating process in order to maintain:
 - a. public nature of court proceedings;
 - b. impartial administration of justice;
 - c. incorruptibility and independence of the courts and judiciary.
- Suppression orders may be made on the provision that the matter proceeds privately, or that a party’s identity not be revealed.
- In **Re Application by Former Officer of Australian Security Intelligence Organisation**, it was held that “it is clear that there is inherent power to impinge by order in a given case upon the general principle that the courts shall conduct their proceedings in public. The impingement may be great or small, as circumstances warrant. At times the encroachment is

so slight as to pass without notice: a witness is permitted to write down his address, which is then recorded in the transcript or sometimes only in the judge's notes, in the latter case the address being communicated privately to the judge alone. On occasions a witness is permitted to go further and to write down not merely his address but also his name, so that he will give evidence as 'Mr X' or 'Col B'.

- In exceptional circumstances, the whole or part of the hearing may take place in private.
- **Ss 18(1)(a) and 30(2)(a) Open Courts Act 2013 (Vic)** orders "necessary to prevent a real and substantial risk of prejudice to the proper administration of justice" and adopt the means that least interferes with the openness of the administration of justice.
 - The test of necessity: that the prejudice "cannot be prevented by other reasonably available means".
 - Other means:
 - a. directions to the jury;
 - b. suppression order;
 - c. orders excluding only certain persons;
 - d. more limited class of persons from the court or tribunal.
- Sensitive issues short of court closure:
 - May use pseudonyms.
 - Prohibiting publication of names.
- "Each application for privacy must be considered on its merits, but the applicant must satisfy the court that nothing short of total privacy will enable justice to be done." : **Re TK (1989) 1 WAR 335.**
 - In **D v Australian Securities Commission**, the publication would adversely affect his professional reputation, and the business of a well-known firm at which he was a partner. Held: refused.
 - In **Re TK**, the case concerned a haemophiliac alleging they had acquired HIV by defendant's negligence in supplying contaminated blood. Held: description "TK" be used in place of the plaintiff's name in the writ.
- Particularly susceptible to publicity and suffer prejudice beyond "the normal embarrassment, discomfort and general unpleasantness".
 - In **Re Application by Former Officer of Australian Security Intelligence Organisation**, it was held that the court possessed but refused to exercise its discretion to describe the plaintiff as "a Former Officer of the Australian Security Intelligence Organisation".
 - In **J v L & A Services Pty Ltd (No 2)**, alleged employers' negligence caused them to contract HIV. Held (first instance): proceed anonymously. Appeal: reversed: discrimination did not outweigh the public interest in open justice.
 - In **E v SE**, brought the civil action at the same time as facing criminal prosecution after a highly-publicised arrest. Anonymity facts and allegations in a statement of claim in the civil proceeding that the two defendants had acted unlawfully were likely to prejudice the criminal proceeding in which the plaintiff was a defendant. Held:
 - Plaintiff granted anonymity.
 - Order suppressing the publication of the instigation of proceedings.

- Fundamental principle of open justice.
 - More fundamental principle that justice was done.
- In **Re Opes Prime Stockbroking Ltd (No 2)**, the issue was whether the names of various clients be kept confidential.
 - “Forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth.”: *s 50 Federal Court of Australia Act 1976 (Cth)*.
 - Held: publication not in the interests of justice; would cause unnecessary harm; potentially detrimental.
- Closure of court to protect trade secrets only in exceptional circumstances.
 - In **R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society**, it was held per Lord Donaldson MR that if publicity caused a run on the society’s funds “it is not sufficient that a public hearing will create embarrassment for some or all of those concerned. It must be shown that a public hearing is likely to lead, directly or indirectly, to a denial of justice”.
 - In **David Syme & Co Ltd v General Motors-Holden’s Ltd**, closure was refused. Restraint could protect confidentiality.

Representative capacity:

- If a party is acting in representative capacity.
- Stated on the originating process.

Addresses of parties and solicitors:

- In **Sheen v Burke**, the plaintiff had listed their “address” on the originating process as being that of their solicitor. It was held that:
 - Address stated on the originating process must be the plaintiff’s residential address.
 - Not considered fatal merely an irregularity.
 - Process for service within the jurisdiction, or outside the jurisdiction.
 - Avoid enforcement of a judgment.

Time of commencement of proceedings:

- The time of commencement of proceedings is once the court registry seals and issues the originating process.
- Defence of that action is statute barred because it lies outside the limitation period.

Other matters in Victoria:

- Plaintiff to certify, along with their originating process, that, prior to the commencement of the action, they made genuine efforts to negotiate the matter and reach a settlement with the defendant.
 - Otherwise the court may issue an adverse costs order.
- To certify, there must be evidence as to when and how the genuine efforts took place.