COMPREHENSIVE NOTES FOR RESOLVING CIVIL DISPUTES (LAWS2371)

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1 INTRODUCTION TO DISPUTE RESOLUTION

Introduction to Dispute Resolution
FDR Ch 1, 2, 9 and 25.

FDR Ch 1 – Changes in Dispute Resolution: Costs, access to justice; multiple dispute resolution processes; globalisation; and technology

1.1 CHANGES

- There are four current causes of change that are likely to shape the future of dispute resolution:
  - cost and access to justice;
  - multiple dispute resolution processes;
  - globalisation; and
  - technology

1.1.1 Cost and Access to Justice

- Cost has been expressed as a human right, and justice being equated with 'a fair and public hearing by a competent, independent and impartial tribunal established by law'
- Main obstacle to access to justice is cost
- To overcome this this has resulted in a number of responses including:
  - Legal aid, community legal centres, pro bono, promotion of ADR, class actions and litigation funding, and streamlining of court processes

Cost

- Debate as to how the to make the cost of dispute resolution affordable while also adequately remunerating lawers who need extensive education, specialised knowledge and practical skills.
- Legal aid, community legal centres and pro bono are current but incomplete answers.
- Government can pay the legal fees for those that cannot after legal advice and or representation but this is only a partial answer as it is not available for all claims – means and merit tested
- Problem –many people in Australia cannot afford the cost of litigation especially if it is in a superior court

ADR

- Debate as to whether the government's embrace of ADR has more to do with fiscal constraints than improving access to justice
- Comments from A-G (Nicola Roxon in 200) appear to allow for government to define access to justice as including a host of activities other than provision of publicly funded courts and that court fees may be legitimately raised to deter citizens from using the courts
  - May encourage citizens to resolve disputes themselves or with a third party but should this be equated with "access to justice"?
- Broadening the available range of dispute resolution options may allow for compromises that satisfy all disputants' interest however equating ADR with access to justice is still controversial – unlike a court, the dispute will not necessarily be decided according to law.
  - Procedural protections mandated by and for courts do not necessarily apply
  - Runs risk of splitting the legal system into two – those that can afford litigation and those that have to settle for ADR.

Class actions and litigation funding

- Class actions and litigation funding have been embraced by government as supporting access to justice
- Class actions make litigation more efficient for claimants by allowing them to share the costs and through economies of scale
  - The combining of claims also increases the value of the lawsuit and can attract legal assistance
- Litigation funding responds to the need for financing of litigation costs
  - However this is selective – it only pursues economic claims with high prospects of success that allow for money to be recovered
  - Litigation funders have sought to reshape class actions to meet their needs
  - Opt-out approach to group definition (that is, all claimants are included unless they exclude themselves). Reasons for this is that it promotes access to justice to group members who cannot be identified at the outset or who are unable to participate due to social/economic barriers
  - Litigation funders altered this approach to adopt a limited group definition – class action is brought on behalf of only the group's members the accept the terms of the funding agreement.
    - *Multiplex* case – Full Federal Court has permitted this however Jacobson J questioned whether this could be reconciled with enhancing access to justice and judicial efficiency to benefit all the aggrieved person
- Access to justice relies on a market based solution – if a case has insufficient financial payoff it will not be funded. Must be careful that the incentives for profit do not undermine the original aim of increasing access to justice.

Court Efficiency

- Cost of going to court can be minimised if the steps to prepare a matter are clear and conducted efficiently
- Need to focus on efficiency has been promoted be legislation or court rules which expressly and mandatorily require balance between achieving justice, and minimising expense and delay – UCPR s 56 "overriding purpose"
- Active case management has been used to achieve this
- Efficiency must be balanced against ensuring a fair trial – although fairness or justice can also be improved by minimising delay and expense

1.1.2 Multiple Dispute Resolution Options

- Movement towards making ADR conventional driven by desire to match disputes with appropriate processes. (ADR referred to as appropriate dispute resolution)
  - The matching of a process to a dispute has become part of the court's case management tool kit in seeking to do justice quickly and cheaply
- Non-court procedures encouraged by Civil Dispute Resolution Act 2011 (Cth) – disputants required to take genuine steps to resolve disputes before commencing proceedings.
- However, litigation should not be ignored
  - The courts have the power of the state, interpret the laws, ensure procedural fairness and render binding decisions in public –for the parties and society at large. These unique feature may be appropriate or essential for a particular dispute
- An efficient outcome may require the combination of both ADR and the courts
  - E.g. litigation may be used for resolving a question of law (through a summary judgment) while ADR might identify the issue sin dispute, or provide expertise for addressing a technical subject matter.

1.1.3 Ethical requirements

- Two important ethical requirements of the lawyer
  - ensure the client does not breach the obligation to assist the court to "facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings"(CPA s 56); and
  - inform the client about the "alternative to fully contested adjudication of the case" (Advocacy Rule 17A)
- s 37N of the FCA Act 1976 (Cth) requires parties to civil proceeding and their lawyers to conduct proceedings consistent with the overarching purpose
  - Overarching purpose is to facilitate the just resolution of disputes:
    - (a) according to law; and
    - (b) as quickly, inexpensively and efficiently as possibly
  - Explanatory Memorandum to the Bill introducing s 37N provides examples of the type of conduct that may attract cost sanctions, most notably:
    - Unreasonably refusing to participate in ADR because ADR can provide a mechanism for the parties to resolve their dispute early, quickly and cheaply;

1.1.4 The mutli-skilled lawyer

- Explaining ADR to client so that they can make an informed decision is an important skill and even an ethical requirement for the lawyer
- Leads to the 'multi-door courthouse' where disputes are triaged, matching the dispute with the appropriate process, being replaced by the multi-skilled lawyer who now performs the triage/diagnosis of advising a client of the ADR processes available.

1.2 GLOBALISATION

- Whether a dispute may have international elements is an important factor in choosing the appropriate dispute resolution process
- Parties typically have concerns that the resolution of the dispute will involve:
  - Neutral processes and an neutral decision maker;
  - access to sophisticated and certain legal system;
  - the ability to enforce the resolution;
  - confidentiality;
  - speed; and
  - minimal or at least proportionate costs.
- Parties may have addressed these concerns through a dispute resolution clause in their contract
  - May provide that the parties adopt arbitration to resolve their dispute – will need to make decisions as to:
    - e.g. the choice of law that will govern the contract, the selection of the seat of arbitration which will determine the procedural law (E.g. Australian Centre for International Commercial Arbitration)
- Globalisation increases the substantive knowledge needed by the lawyer – how various legal systems and non-government organisations provide dispute resolution services → lawyers must be able to advice on the choice of process

1.2.1 Technology

- Technology is the driver of change in society and business – dispute resolution must develop in tune
- Technology has impacted dispute resolution in two ways:
  - Greater need for expertise, and
  - the way in which information is created stored and communicated

Expert evidence

- Subject matter of disputes are more complex and further removed from the layperson's understanding -- knowledge is more specialised.
- Greater frequency of complex questions of fax will lead to greater need to rely on expert evidence
  - Must consider that the reliance on expert evidence meets the standards of admissibility and is managed in a cost effective manner.
  - Must consider how to adduce the expert evidence in a comprehensible and efficient manner
  - Consider whether to use a single joint expert or opposing experts – a single joint expert may have a skewed view if the there is debate within that particular field of expertise

Information technology

- Information technology allows for the courts to streamline their operations and make justice more accessible
- Steps in litigation, such as filing and serving court documents can be done remotely (SMS or social media may be used as a form off substituted service)
- IT also impacts traditional trial format – use of real-time transcripts, telephone/video conferencing with witnesses in remove locations, and showing exhibits on digital displays
- IT furthers the essential features of the court – the right to be heard and open justice (e.g. online courts used for non-contentious matters such as directions hearings)

- IT may also be used by non-court dispute resolution processes – as requirements such as open justice do not need to be observed, even greater efficiencies may be possible.

FDR Ch 2 – The Future of Dispute Resolution: Access to Justice, the Role of the Courts and Internationalisation

1.3 ACCESS TO JUSTICE

- Crucial access to justice issues for the next 40 years lie in three areas:
  - keeping the cost of all forms of dispute resolution low;
  - ensuring that the dispute resolution process is not unnecessarily drawn out or delayed because the incorrect dispute resolution technique was employed;
  - adapting dispute resolution processes to make the accessible and comprehensible to members of society without a legal background and people with a different background (Indigenous people)
- Litigation funding
  - Has the advantage of enabling people who could not otherwise afford to do so obtain redress in respect of their claims
  - However still a need for funded actions and class actions to be monitored to prevent vexatious claims or claims which are so wide as intolerably burden the defendants./
  - Litigation funders are also in the business of funding ot make a profit
- Emotional cost of litigation
  - Encouraging access also includes providing options to those who want to avoid confrontation
  - E.g. Victims of sexual assault are able to provide evidence in CCTV rather than confront the accused in the courtroom.
- ADR
  - Lawyers must be able to integrate and navigate through the large number of dispute resolution processes – using mediation, e.g., at the wrong time may increase the stress and financial pressure for clients.
  - How should we assess ADR? Currently has been done focusing on client satisfaction – whether or not they achieve an outcome. Must conduct empirical research as to whether the existing techniques suit the interests of justice and the interests of the parties.
  - Predict that ADR will be compulsory in every case
    - Forcing parties to ADR will undermine legal system's goals of justice and fairness.
    - E.g. danger that forcing pre-trial mediation will be misused to frustrate a plaintiff in pursuing a legitimate claim – also may result in 'satellite litigation' where the court investigates what occurred or should have occurred during mediation before determining the merits of each party's case.

1.3.1 The role of courts and judges: Case Management and Technology

- Cost of litigation has changed the role of the courts making them more interventionist
- Fine line between maintaining adversarialism, where parties have control over their proceedings, and maintaining the integrity of courts as public institutions, funded by taxpayers, accessible to all and able to make decisions without lengthy delays.
  - Case management vs parties being in control of their proceedings.
- Courts are now expected to manage individual cases and also the caseload of the court as whole.
- Efficiency is about striking a balance between doing things well and quickly as possible, without compromising standards.

FDR Ch 9 – The Relationship Between the Courts and Alternative Dispute Resolution

1.3.2 Interaction between ADR and the Courts

- Most courts have welcomed ADR
  - Courts offer court-annexed mediation which is an important in the case management repertoire
- Criticism on encouraging settlement through ADR
  - Judges may be said to focus too much on clearing court's lists and relieving their own dockets
- Broader concern – encouraging and funding ADR may reduce the level of funding for the Courts. ADR might reduce the impetus for ongoing reform of civil procedure. Also power imbalances in ADR.
- Problems with settlement
  - Cases of high precedential value ought to be decided by the Courts (e.g. Mabo)
- Issue for the future – cases that ought to be decided in the courts are resolved by other means and the role of the courts in their civil jurisdiction falls into decline
- Answer to the concerns
  - Must develop a robust and accessible and properly funded system of civil justice, alive to the danger of the growth of ADR

1.3.3 Procedural reform

- Example of the Federal Court's Fast Track procedures – offer a solution to the problem of cost, delay and practical inaccessibility.

1.3.4 Matching disputes with processes

- The choice of ADR and choices of approach within a category will have the capacity to affect the justice of the outcome, the satisfaction of the parties and the broader interests of the community
  - E.g. a judge may identify an issue and the problem to be resolved while another person engaged as a mediator (not necessarily a lawyer) may still recognise the issue but may direct his/her view to different matters. Mediation may result in the parties resolving their dispute on their own terms which may not reflect their legal merits.

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2 INTRODUCTION TO CIVIL PROCEDURE

Introduction to Civil Procedure
BKL [1.20]-[1.180], [1.300]-[1.470], [1.500]-[1.510]. (Note: [1.520]-[1.650] and the creation of NSW Civil and Administrative Tribunal and the renaming of the Federal Magistrates Court as the Federal Circuit Court of Australia)

Basic Steps in Civil Litigation

- Pre-Commencement
  - e.g. obtaining freezing orders and search orders
- Filing and Service of Originating Process (pleading)
  - Statement of claims need to be served on the other side
- Defences & Cross-Claims
  - Defence may be suing Pl or 3rd party
- Discovery/Issuance of Subpoenas
  - Discovery involves obtaining documents from opponent subpoena is obtaining documents from 3rd party
- Filing of Evidence – Affidavits
- Trial
  - Where evidence is presented, cross-examination and direct examination of witnesses etc
- Appeal
- Enforcement
  - After judge has made decision they determine the best way to enforce decision (e.g. how payments should be made to Pl if they are successful)
- ADR can take place at any time
- Tactical Decisions: security for costs, offers of compromise, etc.

2.1 PROCEDURAL LAW

- Substantive Law
  - The law that defines legal rights, duties and liabilities
  - Applicable law is the law of the place where the wrongful act was committed
- Procedural Law
  - The law that governs the conduct of proceedings before the court (that are used to enforce substantive rights or claims)
  - Does not impact on the substantive law itself
  - Sometimes described as "adjectival" law
- Substantive v Procedural Law
  - Procedural law regulates the way in which substantive rights and obligations are claimed and enforced, without impacting on the definition of those particular substantive rights
  - Distinction between substantive and procedural law stated by majority in *John Pfeiffer Pty Ltd v Rogerson*
- Purpose of Procedural Law
  - To provide rules that facilitate dispute resolution
  - To provide procedural fairness and due process to litigants
  - To promote access to justice
  - To address issues of cost and delay
  - To promote the legitimacy of the legal system
- Object of civil procedure is:
  - To give effect to the substantive law i.e. to facilitate judicial decision making
  - To ensure the use of fair procedures such as the use of witnesses, discovery and appeals
  - People are more accepting of the outcome if they feel they have been dealt with fairly

2.1.1 Sources of procedural law

- ***Civil Procedure Act 2005*** **(NSW)(CPA)**
- ***Uniform Civil Procedure Rules 2005*** **(NSW)(UCPR)**
- **Practice notes** (issued by Chief Justice and provide guidance to the other rules)
- **Court Rules**
  - *Supreme Court 1970, District Court Rules 1973, Local Court Rules 2009*
- **Inherent and implied jurisdiction**
  - Inherent jurisdiction (or inherent power) in superior courts of records (e.g. Supreme Court) to regulate their processes and prevent an abuse of process
  - District Court and Local Court have a limited jurisdiction which arises expressly under statute or is derived by implication from statutory provisions conferring particular jurisdiction – *Grassby v The Queen*
- Distinction between inherent and implied jurisdiction addressed in *Grassby v R*
  - The distinction may be illustrated by the *Reg v Lefroy* where it was held that the power to punish summarily for contempt not committed in the face of the court is inherent in a superior court but forms no part of the powers of an inferior court.
- Where a court's powers are defined by statute there is an implied power to do that which is required for the effective exercise of jurisdiction – *TKWJ v The Queen*
  - A statutory court has the power to do that which is 'really necessary to secure the proper administration of justice in the proceedings before it' – *John Fairfax v Police Tribunal NSW*
  - 'necessary' does not mean 'essential', but rather it is to be 'subjected to the touchstone of reasonableness'
- Exercise of inherent/Implied Powers
- ***Pelechowski v Registrar, Court of Appeal***
- [50] Dawson J concluded [in *Grassby v The Queen* (1989) 168 CLR 1] the recognition of the powers which an inferior court must possess by way of necessary implication will be called for: "whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction.'"
- [51] The term "necessary" in such a situation is to be understood . . . as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of specific remedies for enforcement provided in Div 4 Pt 3 of the District Court Act. In this setting, the term "necessary" does not have the meaning of "essential"; rather it is to be "subjected to the touchstone of reasonableness".

2.2 GUIDING PRINCIPLES FOR PROECDURE

- **Overriding purpose (s 56)**
  - Overriding purpose of the CPA and the rules of court, in their application to civil proceedings, is to facilitate the **just, quick and cheap resolution of real issues** in the proceedings
  - Court must seek to give effect to overriding purpose when it exercises any power to it by the CPA or by rules of court
- **Dictates of justice (s 58)**
  - Court is to follow dictates of in deciding whether to make any order or direction for the management of proceedings, including orders for amendment or adjournment
  - To determine what are the dictates of justice in a particular case, court must have regard to overriding purpose and objects of case management (ss 56 and 57)
- **Elimination of delay (s 59)**
  - Courts must implement its practices and procedures with the object of eliminating any lapse of time between the commencement of proceedings and the final determination beyond that which is reasonably required for the interlocutory activities necessary for the fair and just determination of the issues in dispute between the parties and the preparation of the case for trial
- **Proportionality of costs (s 60)**
  - CPA requires court to implement its practices and procedures with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject matter in dispute

2.3 ADVERSARIAL SYSTEM OF CIVIL LITIGATION

Adversarial System	Inquisitorial System
- Party controlled dispute - Use of precedent, procedural rules and laws of evidence - Impartial judge acting as "umpire" - Reliance on oral testimony subject to cross-examination - Distinct pre-trial and trial stages - Open justice - Includes provision of reasons for decision - Subject to certain limitations - see *Hogan v Hinch*	- Judge is proactive and inquisitorial - Minimum rules of courtroom practice - Focuses on documentary proof - There is no rigid separation between trial and re-trial phases - No use of transcripts to record court proceedings - Main sources of law are codes with commentary from legal scholars

[1.100] Review of the Adversarial System of Litigation: Rethinking the Federal Civil litigation system

- The civil law and common law systems are the two legal families that have dominated and continue to dominate the 'western' legal systems.
- The two types have different features however are not polar opposites – both have overall objective to establish systems for the just resolution of disputes and maintenance of social order → their means of achieving such ends is that which differs.
- All relevant legal systems in the western world are hybrids of the two models of civil law and common law or of other legal families – no pure example of either civil law or common law
  - Essential features of common law family and essential features of civil law family (p 10)
- Australia inherited the adversarial common law system of England

Reforms of the adversarial system of litigation

- Adversarial system model has been criticised on the grounds that it prevents access to justice due to its cost (both private and public) and delay
  - Criticised as unjust, unequal and produce inaccurate results
  - Lord Woolf conducted major review of civil justice system in England and Wales → found that primary problem of unrestrained civil adversarial culture was that it restricted access to justice
    - Lord Woolf's review recommended a number of reforms, e.g. early settlement of dispute, greater use of ADR, single expert witnesses, encouraging cooperation amongst lawyers, identification and reduction of issues as a basis for case preparation, moving to trial as quickly as possible if settlement is not possible, and use of overriding objectives in court rules.
- In Australia criticisms resulted in ALRC conducting its own inquiry into adversarial system
  - Reforms of civil justice system have resulted in greater use of case management and ADR

Victorian Law Reform Commission, Civil Justice Review

2.3.1 Definition of effective, efficient and fair court adjudication

- Funding is a critical factor affecting the operation of the civil justice system → the quantity of judicial and other resources available to deal with cases will be an important determinant of the capacity of the civil justice to deal with the demands of the litigants
  - Funding also impacts the level of judicial and other resources, and the quality of judicial and other court personnel
- Requirements of effectiveness, efficiency and fairness with regard to court adjudication. Court adjudication is:
  - **Effective** if it determines claims with reasonable accuracy, within reasonable time and with proportionate investment of litigant and public resources
  - **Efficient** if public and litigant resources are employed to maximise effectiveness and are not unnecessarily wasted