Civil Procedure
Lecture 1: Introduction to Civil Procedural Law

Why study Civil Procedure?

- Because it is absolutely essential if you practice
- Because an understanding of procedure is vital to an understanding of law:
  - In two senses:
    - Concepts whose understanding helps one understand primary legal material, and cases in particular;
    - Procedure determines the ease with which legal rights are enforceable.
    - The English and Europeans developed a very sophisticated system designed to discourage people using civil litigation and encourage ADR. It used forms of trials, which were perhaps implausible, and one did not embark lightly on Civil Litigation.

The objectives of civil procedure: the *Civil Procedure Act 2010*

- This Act is important for two reasons. First, it bears on the question of what constitutes a good civil procedure system. Second, it is intended to, and probably will, make a considerable difference to the conduct of civil litigation in Victoria. It bears on a variety of sources of procedural law and lore:
- It affects the statutory framework governing civil procedure in this state;
- It envisaged, and required, rules, and changes to rules, in order that it be implemented;
- It expands courts' powers to give directions; and
- It seeks to, and probably will, change the legal culture

3 MAIN TOPICS:

1. The objects of a Civil Procedure system; in particular ***The Victorian Civil Procedure Act 2010***
2. **Civil Procedure Law**: the rules are extraordinarily flexible and extraordinarily contingent, they are subject to negotiation and its very rare to find another body of Law which says "here are the rules, but if you don't comply with them it will not necessarily befall you." It has rules that apply, but the court can decide when they do not apply. It is a system where you have a whole level of hierarchy of rules, each of which is highly dependent on the culture with which they operate.
3. **The Jurisdiction of Courts:** and the Aust. Court hierarchy.

THE VICTORIA CIVIL PROCEDURE ACT 2010:

- Is a motherhood Act- its designed to produce a culture shift, rather than an *Act* which creates obligations which are readily enforceable. Its designed to deal with some of the pathologies of the Civil Justice System which all Civil Justice systems possess particular pathologies partly because they are intended to provide access to Justice, but they can also be used as a form of injustice.
- One of the things you can buy is **DELAY**- Civil Procedure Systems are very good at providing delays. There are cases from the European Courts of Human Rights that have found that the government has denied someone basis human rights by virtue of not acting promptly on the basis of the matter at issue and where the court has taken 4 years to reach its decision. So **DELAY** is one of the dangers. If you're rich, if you're a wealthy company you can buy delay if you need it. Usually the weaker side to the dispute is anxious to buy delay; in the hope that it will work and turn things around and as a form of cohesion used in bargaining in ADR.

- The pathologies are inescapable; one thing about **legislation** is that it tells you no only how you are suppose to behave, it also tells you the fact that people aren't behaving in this way. When the Pope denounces heresy- it's a statement that heresy is reprehensible, but its also a statement that heresy is going on and it communicates the subtle message that if you are feeling heretical too, then there are others doing likewise. So **legislation** is a guide to the statutory existence recognition of problems.

The Civil procedure Act does a variety of things:

- It provides a statutory framework setting up ideals about how Civil Litigation is to be conducted
- It also envisages some provisions which are now gone
- It expands the courts power to give directions
- It includes minor statutory changes to some of the rules of Procedure
- It works towards changing the culture.

Key concepts: overarching purpose

- *Overarching purpose* s 7: 'to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.
- Court 'must seek to give effect to the overarching purpose in the exercise of any of its powers': s 8(1)
- To do so, it must have regard to listed objectives: s 9(1):
  - *Just determination*
  - *Public interest in settlement*
  - *Efficient conduct of court business*
  - *Minimising delay*
  - *Timely determination*
  - *Proportionality, having regard to complexity, interests, and stakes, and to do so, it must have regard to listed considerations: s 9(2)*

THE VICTORIA CIVIL PROCEDURE ACT 2010:

- ***Section 7: Overarching Purpose:*** to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'.
- **Section 8(1):** Court 'must seek to give effect to the overarching purpose in the exercise of any of its powers':
- **Section 9(1):** must have regard to the above listed objectives. (see above)
- **Section 9(2):** (see above)

THE LISTED OBJECTIVES:

- There is the reality that you can't have all the listed objectives in the one trial. *FOR EXAMPLE:* If you have fast Justice, you probably have impaired Justice, if you have Justice than it's likely to be expensive.
- So you are not dealing with ideals; each of which can be pursued at cost to the other, rather you have a system of ideals where trade-offs are necessary. The key to how the trade-offs are to be made is proportionality.

PROPORTIONALITY:

It involves trying to work out what is an optimal balance having regard to the complexity, interests, stakes etc. involved in the case. *FOR EXAMPLE:* if the stakes are very high, then investing considerable resources in resolving the dispute accurately also makes sense.

HIERARCHY OF COURTS:

If the stakes are small then it may be better that the occasional error be made than the right solution be pursued as vigorously as possible. For that reason, no system of Law would treat

the conduct of a capital punishment case (if there were such a thing) with the same degree of expedition as a Magistrates Court dealing with a drunken public charge. That's why there is a hierarchy of courts and different expectations. Magistrates Courts do a very good job in disposing of matters quite quickly, cheaply and with a certain amount of injustice. The higher courts such as the Supreme, Federal do a pretty good job at getting the Law right, a pretty good job at resolving accurately disputes involving huge stakes, but they are not accessible, quick and they are not for the faint hearted. The demand for proportionality involves allocating resources taking into account all various interests.

Overarching principles cont.

- S 9(2) Matters to be taken into account:
- Compliance with pre-litigation processes;
- Attempts to settle the dispute;
- Promptness in conducting the litigation,
- But subject to circumstances beyond a party's control;
- Compliance with overarching obligations (see below);
- Prejudice to a party if a proposed order/direction is made/given;
- Public importance of the issue and desirability of a judicial determination;
- Whether parties have had full legal representation.

<u>THE THINGS YOU LOOK AT WHEN DETERMING IF THE OVERARCHING PRINCIPLES HAVE BEEN COMPLIED WITH:</u>

- ***Section 9(2)***
- These are the kinds of things which the court needs to take account of in making procedural decisions, FOR EXAMPLE: If someone is seeking the equivalent of an intervention Order because they believe the other side is wanting to kill them and have got evidence that on a number of occasions the person has shot at them and missed only because they were drunk. The court is not going to say that "what you are asking is going to inconvenience the D, the D wont be able to walk past your house and will have to drive another km to get to work etc." I don't think the court will likely inconveniences D especially when there is no proof of the allegations. They are very serious allegations and reflect adversities on D character. It will be extremely unfair to make a finding even on the interlocutory basis; the court will refuse to make the order. If P is actually shot then they can get their remedy.

<u>REPRESENTATION</u>:

The court will also take account of whether someone has full representation or not, if they don't then they are going to make mistakes, cause delays because of the unfamiliarity if the court procedure and they will do things that need to be undone etc. If on the other hand, they have legal representation than they have no excuse for making mistakes. If there excuse is that their legal advisor is the one mistaken, then they can be sued.

Key concepts: overarching obligations

- A paramount duty to the court to further the administration of justice: s 16
- A duty to act honestly: s 17
- No claim without a proper basis: s 18 (incl: no claim without a proper basis at the time it is made)
- No steps other than those necessary to resolve the dispute: s 19
- Cooperation: s 20
- No misleading or deceptive conduct: s 21
- Use reasonable endeavours to resolve the dispute: s 22
- Narrow issues in dispute: s 23
- Ensure costs are reasonable and proportionate: s 24

- Minimise delay: s 25
- Disclose existence of documents: s 26
- Respect confidentiality of disclosed documents: s 27

Sections 16-27

- **A paramount duty to the court to further the administration of justice: s 16:** your duty is to the court, even if your client has retained you, the express purpose of putting off Justice as long as possible is inconsistent with Section 16 and there are various sanctions which can be used.
- **A duty to act honestly: s 17:** not allowed to perjure yourself and no self-respecting legal system will tolerate dishonesty. But, despite what one might hope for, dishonesty is a characteristic feature of mobilizing the Law. Although there needs to be a distinction between dishonesty and not telling the truth. Dishonesty is knowingly not telling the truth, but people may not tell the truth for a variety of other reasons. One of which they simply believe the untruth they are not telling. People have a remarkable capacity to construct stories, and when they do it is often reconstructed favourably to themselves, they believe the, but they are nonetheless misrepresenting things. But in effect, dishonestly involves knowing that you are not telling the truth.
- **No claim without a proper basis: s 18 (including: no claim without a proper basis at the time it is made):** The traditional rules were that when you brought a case, you stated what the facts were which you were relying and it was for the D to respond to that, the courts interpreted this procedure as involving no more than stating some facts. Whether they were true or not was beside the point. You weren't swearing that they were true, you were stating simply that you would prove them. There is something a little dishonest about that but it was accepted that a statement of the facts you were relying on in a claim was simply a statement of the facts that you were trying to prove. It wasn't a statement that the facts were true. The rule however is now that if your client says "I know this isn't the case, and I doubt very much and I wont swear to its truth if I have to, but the D will have to prove otherwise and the D might not be able to do so." This is not allowed, the answer that the lawyer must give is that it is unacceptable to do so unless you believe in the truth of every allegation you make in your claim, you may not include that allegation. Not only are you not allowed to assert something that you believe to be true, the claim must have a proper foundation at the time it is made. So if you make claims, which you don't believe to be true and they turn out to be true, you are still in breach of Section 18.
- **No steps other than those necessary to resolve the dispute: s 19:** Sometimes procedural steps are one of the ways parties seek delay.
- **Cooperation: s 20:**
- **No misleading or deceptive conduct: s 21:**
- **Use reasonable endeavours to resolve the dispute: s 22:** For example: if one side volunteers to take some form of ADR, then the other side should think seriously about it.
- **Narrow issues in dispute: s 23:** minimise delay, disclose the existence of all documents in your possession, and respect the confidentiality of the disclosed documents.
- **Ensure costs are reasonable and proportionate: s 24:**
- **Minimise delay: s 25:**
- **Disclose existence of documents: s 26:**
- **Respect confidentiality of disclosed documents: s 27:**

Who owes the duties?

- Parties, practitioners, practices and funders: s 10(1)
- Not witnesses, except that expert witnesses are bound by ss 18, 19, 22 and 26

- Obligations generally trump other legal obligations insofar as there is inconsistency: s 12. This includes instructions from clients if they are incompatible with the overarching obligations: s 13(2), but in the event of incompatibility, 'overarching obligations' are trumped by obligations owed by practitioners to the court: s 15.

DUTIES OWED BY: Parties, practitioners, practices and funders: ***s 10(1)***

FUNDERS:

There has been recently a shift towards a market model of litigation; there are several reasons for this:

1. **Legislation:** has created opportunities for making claims which once weren't available
2. **Legal Aid:** which was once more widely available then, it is now and the disappearance of Legal Aid means that there must be some other mechanism whereby people with an economic disadvantage can be able to participate in the legal system.
3. **The issue of costs**: so there are those who fund litigation on a contingency basis, if you win; they take a cut. If you lose; you bear the costs. It's a kind of litigation insurance. There are some law firms, which are very much engaged in commerce, they announce successful outcomes of litigations with their logo in the background.

Some of the traditional obligations owed by the lawyer to their client are now subordinated to the overarching obligations.

- Duty to act on the instruction of your client: this has been modified, so if the client wants to do any of the prohibited things, then the lawyer is not obliged to comply with the instructions and the lawyer is indeed obliged not to comply with the instructions.
- The overarching obligation is subject to the obligations owed by Practitioners to the Court. There is a body of Law, which has been developed over the centuries which relate to the obligations which a lawyer owes to the courts. These obligations are been bound up with almost the inherent powers of the courts and are the central core of curial activities, they are not interfered with and it may be unconstitutional to interfere with them, so we have the overarching obligations which are theoretically not overarching.

What happens if duties are breached?

When people fail to comply with their legal powers, their decisions might be a nullity and if there is an error there is also the right to appeal.

Does this mean that if the case is not pursued quickly enough you can appeal against the decision and have the case reheard on the basis that their was failure to run the case speedily?

No, because what would be more absurd, given the objectives of the system saying "if the case is been pursued too slowly the decision must be quashed, so the case then can succeed only if its re-run." This will take away resources and will add to costs and won't be efficient. There are no sanctions, but there are contexts in which sanctions are possible.

Sanctions for breach of duty

- Breaches may be taken into account in exercising discretions: s 28. Note that civil procedures include numerous contexts in which the court exercises discretionary power (amendment; adjournment; interlocutory relief).
- Court has flexible powers in relation to the making of orders in relation to the payment of costs in proceedings, and may order compensation for loss occasioned through non-compliance: s 29. These are in addition to powers the courts already have.

SANCTIONS:

- **DELAY:** If you cause unnecessary steps to be taken, then you bear the costs. Using the system for delay, causing the other side to run up on unnecessary expenses is something to be compensated for.

CONDUCT IN PROCEEDISNGS:

There are frequent orders made in relation to the conduct of the proceedings. The orders are almost discretionary.

For Example: you might want to amend your claim in order to make it legally sustainable, or you might want to bring in new elements etc. To do this in the middle of proceedings, you need either: an agreement by the other party or an order by the court.

Will the court make the order?

This is a matter of discretion, it involve proportionality analysis of the kind which the Act envisages be applied and if you behaved like a good litigant, getting everything on time, not making unnecessary applications, trying to use ADR, and you come along and say you have made a mistake and want to add something to your claim, the court might be sympathetic to your claim. If on the other hand, you have been fairly clearly making unnecessary applications etc. the court will not accept it. So the sanctions lie in costs and in your capacity to get **interlocutory orders** made in your favour.

Observations:

- Act highlights the contradictory objectives of the Civil Justice system, and the ambivalence with which it is regarded. First consider the over-arching purpose: 'just, efficient, timely and cost-effective' resolution of disputes. Self-evidently desirable, but the concepts are ambiguous; there is potential conflict between them, and it may be difficult to know whether particular procedures in a particular case will contribute to the fulfilment of a particular purpose. Second, the Act reflects ambivalence towards the civil justice system. Is it to be a process for resolving disputes, or is its purpose to act as a deterrent to failure of parties to resolve their disputes?

Conflicting and ambiguous purposes:

- The enumeration of the four purposes implies that they are different.
  So, for example, 'justice' is not the same as 'timely' or 'efficient' justice. Justice is presumably justice according to law, and involves an outcome which is legally correct and fair. Efficiency involves recognising that justice considerations should sometimes be subordinated to economic considerations. Timeliness may be at the expense of justice and it may sometimes give rise to inefficiencies. Cost-effectiveness is closely related to efficiency, but may relate primarily to the government's interests. Party interests may conflict with societal interests.

Two illustrative cases:

1. ***Sali v SPC*** **CB [2.6.4] (to be discussed in week 2 tutorials)**
2. ***Aon Risk Services Australia v ANU*** **[2009] HCA 27; (2009) 239 CLR 175; CB [2.6.8])**

- Interests of timeliness?
- Efficiency?
- Cost effectiveness?
- Interests of justice?
- A final decision consistent with the spirit of the CPA 2010, but note the first instance and appeal decisions, and consider the implications of the fact that these were given.

Sali v SPC CB [2.6.4]:

- The court never resolved all the issues. Mr Sali had been involved in commercial difficulties, there had been previous litigations, which had then turned out adverse to him, and an Order was made making him bankrupt.
- He appealed against the Order and the Court of Appeal was due to hear the application. A few months before hearing the application, there was spring offensive which was an attempt by the court to get as many cases off its list as possible. Counsel were subjected to moral pressure and try to settle, cases were subjected to Directions Hearings designed that they were to resolve quickly.
- As it happened, the spring offensive was successfully; it reduced the backlog massively. Mr Sali didn't like the idea and didn't want the case resolved quickly. After all he seemed to be using the system for buying delay hoping that his business would turn the corner and he would be able to start prospering again.
- His case was scheduled for a date in which gave him a month time to find a lawyer to argue it, his story was that he had contacted all the clerks (ones who make barristers available) looking for a QC and none of them had been able to find one.
- **There were 2 arguments**:

1. *Infact perhaps there were Senior Counsel who were available?*
2. *Was a Senior Counsel even necessary?*

- The case came before the court for an application to adjourn it. Counsel who was briefed to make the application was not briefed to argue the case in the event that the application was refused. Courts don't like the idea of effectively disposing the high stakes case by not allowing it proceed, or by making procedural decisions which means it cant go on. Aust.
- Courts are particularly tender hearted in this respect, American Federal Courts are more tough minded. Anyway, the Barrister turns up at 9:30 and the Supreme Court said they will not ground the adjournment and they were not convicted because the reasons given are persuasive reasons and they were not persuaded that no QC was available and that if none was available, then a junior could have been available.
- At this point, the Junior Counsel asked if the hearing could be adjourned till 2:30 so they he could get advise from the client about what steps to take. This was a fairly clever step by Junior Counsel and one would normally have expected the court to allow it. The court of Appeal disallowed it on the basis that 3 days were set down for the Court of Appeal trial and therefore there is no guarantee that if an adjournment is granted the case would drag on into the 4th day and it would inconvenience other litigants. So the court denied permission.
- **So Sali lost in the COA and went on to the High Court.**
- **The High Court split 3/2.** The minority said that some of the inferences, which the COA had drawn, were questionable on the basis of the material before it. It was perhaps unduly suspicious; it assumed alternative motives where the evidence didn't provide a high level of support. It was therefore on balance unfair that Sali was denied his 3 days in Court.
- **The majority said that there are conflicting interests.**

1. There was enough evidence to support the COA's finding that Sail's behaviour had been strategic rather than sincere and the majority was unimpressed by the moral blackmail.
2. It also pointed out that days before the adjournment had been given were over.
3. The interests of Justice were not only the interests of particular litigants; it also involves the interests of other litigants.
4. The spring offensive was designed to deal with the accrued problem of delays and therefore the decision of the COA was one open to it.

5. **<u>One important consideration in Sali:</u>** The HC is not asking what order would it have made? Rather it is asking was there a miscarriage of Justice in the making of this discretionary Order by the COA? It kept to itself the question of what it would have done but it concluded that it was open to the COA to do what it did.

<u>Aon Risk Services Australia v ANU</u> **<u>[2009] HCA 27; (2009) 239 CLR 175; CB [2.6.8]):</u>**

- There was a dispute with ANU and people associated with insuring it and arranging its insurance. The ANU had owned an observatory, which got destroyed in the ACT bushfires, and the ANU turned out to be under insured.
- It sued those who were regarded as responsible. At the last minute, it settled with one of the parties and then sought to amend its claim in bringing the other party involved in the litigation on the basis of completely new grounds.
- When it was asked why has it waited until this belated time to do so, it gave a fairly unhelpful explanation. It basically said that the decision was based on the calculation of the strategic desirability of going forward in making an early amendment or making a later amendment.
- The Supreme Court of the ACT held that the ACT should be given leave to Appeal.
- **The COA of the ACT dismissed the AON Insurance appeal against that decision**.
- **The matter than went to the HC:** which decided that both the trial Judge and the COA had got it wrong.
- **They effectively said:**

1. No satisfactory explanation was given, in the absence of a satisfactory explanation it would be very hard why an adjournment could be justified especially that the last minute had been chosen rather than an earlier time, ANU failed to take a step which it should have taken in an earlier stage and wasn't acting as the model litigant which the Victorian legislation envisage.
2. They also took account of the fact that the ACT had legislation which was fairly similar to Vic. Making it clear that the philosophy of the courts should be not to grant unnecessary and belated applications for adjournments
3. When one was considering Justice, one has to consider Justice as between all the stakeholders in justice. The traditional view of Justice was that it was a matter as between the parties. But the HC said that this view of Justice has long ceased to be accurate. Civil Justice involves conflicting claims. If one party prolongs proceedings, that means delays for the others. Time had been set down for trial of at the ACT litigation that could not be fulfilled by other litigants and it was time wasted. The party how wanted this, could not have come to the court and expected that the court set aside another block of time which would mean delay for other subsequent litigants.

- **<u>HELD:</u>** an adjournment was once more refused for the above reasons.
- **<u>JUDGEMENT BY HAYDEN: "</u>**It is the kind of denunciation which would make me terrified of been a Supreme Court Judge and if I had been the trial Judge in that case, I think I would have wanted to slunk off and taken poison. It is bad enough that the trial Judge made the wrong decision. It is aggravated by the fact that the trial judge himself contributed to delay.
- This is a matter that could have been decided on the spot. The facts were simple, the Law was simple, the result was self-evident, and the judge got it wrong. But then, not only got it wrong but took months to get it wrong. Her was something where a decision was urgent and it was not given.
- The judge aggravated it by awarding costs to the party, which had sought delay, which it was not entitled. As if this was not bad enough. The matter went to the COA; the matter languished for months before the COA was able to hear it.