DISPUTES & ETHICS NOTES

1. Resolving disputes through the legal system

Disputes are an inevitable part of social life. They have the potential to be harmful to the parties and to the community. Many disputes are resolved by the parties themselves. However, some parties are unable or unwilling to resolve their dispute without recourse to an external dispute resolution system. CONSIDER →

- PROBLEMS of disputes and how they can be resolved
- what should be the goal(s) of a decent dispute resolution system? What kinds of processes should it involve?
- The kinds of disputes in the AU legal system, is settlement on any terms agreed by the parties? By adjudication according to law? Or in some other way?
- Distinguish between negotiation, mediation and litigation:

READING:

- Hon Kenneth Hayne, 'Dispute Resolution and the Rule of Law' Sino-Australian Seminar, Beijing, 20-22 November 2002
- Dame Hazel Glenn, *The Hamlyn Lectures: Judging Civil Justice* (2008) pp. 10-24
- Hilary Astor and Christine Chinkin, 'Litigation and Alternatives Methods: A false dichotomy' in *Dispute Resolution Australia* pp. 43-51

DISPUTE RESOLUTION – THE FAIR TRIAL

The right to have certain disputes resolved according to law through the mechanism of a fair trial, a right that is a central element of our legal system → whether it is lauded or lamented, the trial process has become a benchmark against which other forms of dispute resolution are often measured:

- in some instances, the trial is seen as the embodiment of valuable qualities that should be approximated; while in others, the trial is seen as the repository of shortcomings that should be avoided.
- Rules have the advantage of being clear, predict outcome of behaviour, and standards have the advantage of flexibility: allow adjustment to different type of cases

Further, the idea of the fair trial informs both:

(i) conceptions of the lawyer's proper role, and
(ii) The rules and principles that govern legal practice.

The role or relegation of the lawyer cannot be properly understood without understanding the fair trial.

ELEMENTS OF THE FAIR TRIAL:

What things would be needed in order to ensure that trials are fair? In AU legal system, what are considered the core principles to a fair trial? Are these in competition with one another?

- The principle of publicity and the right to a public hearing – an open and public inquiry.
- The Right to be Heard
- The Right to a reasoned decision – application of the law to the facts.
- The Right of Access to Evidence – opportunity for parties to present evidence and to challenge evidence
- The Right of Access to Justice – proceed in a way that ensures equality before the law (unsettled by the HCA).
- The Right to an independent and impartial tribunal

The Commonwealth Constitution relevantly applies only to High Court and Federal courts: section 80 (jury trial for indictable federal offences) and section 72 (independent judiciary). Consider the text and structure of Ch III and the nature of judicial power → judicial independence and the separation of powers.

R v Quinn:

JACOBS J:

"…[W]e have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

MAGNA CARTA →

> Trial by jury is the most venerated and venerable institution of Anglo-American law. Although it dates from 1215, it did not come about as a result of Magna Carta, but rather as the consequence of an order by Pope Innocent III (1161–1216). However, Magna Carta's iconic reference to '**the lawful judgment of his peers'** as a precondition for loss of liberty has helped in later centuries to entrench the right to jury trial in our pantheon of liberties.
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> The original clause 39 of the Great Charter of June 1215 reflected a privilege negotiated by the barons to ensure that their disputes with the King – mainly over land – would be settled after advice **from men of their own rank and status**. Criminal trials at the time took the form of 'ordeals' by fire or by water; supervised by the local priest. God was the judge, and he would ensure that the innocent survived – thus, suspects dunked in ponds were declared guilty if they drowned.
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> In November 1215, Pope Innocent III, perhaps concerned that wrongful convictions were destroying faith in divine providence, forbade clerical participation, and so 'trial by ordeal' lost its point. It was replaced by a method of fact-finding used in land disputes and by coroners – the summoning of local men likely to know the circumstances of the crime. In due course, 'twelve good men and true' emerged to deliver acceptable verdicts (not until the 20th century were 'good women and true' included in their number).

VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES:

8 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.
(2) Every person has the right to enjoy his or her human rights without discrimination.
(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

24 Fair Hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) Despite subsection (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter. Note See Part 5 of the Open Courts Act 2013.

(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.

ADVERSARIAL APPROACH → qualified by the goal of fair trial.

SOLICITORS' CONDUCT RULES:

19.6 A solicitor must, at the appropriate time in the hearing of the case if the court has not yet been informed of that matter, inform the court of:

19.6.1 any binding authority;

19.6.2 where there is no binding authority, any authority decided by an Australian appellate court; and

19.6.3 any applicable legislation,

known to the solicitor and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.

24 Integrity of evidence – influencing evidence:

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

29 Prosecutor's duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts. […]

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

CENTRALITY OF PARTIES:

International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319

HEYDON J:

The pivotal role given to parties? Consider →

A court may not decide a case on a point not raised by one of the parties or by the court for the consideration of the parties…**The court is not entitled to take into account factual material not in evidence** without notice to the parties. The court is not entitled to take **judicial notice** of particular matters of fact after inquiry without notifying the parties of the inquiry and giving them the opportunity to controvert or comment on the source in which the inquiry is made

If, in determining whether the law should be developed in a particular direction, the court has recourse to learned works, it ought to give the parties an opportunity to deal with all matters which the court regards as material. The same is true where the court is concerned with matters of fact going to the **constitutional validity** of legislation, the construction of statutes, and the construction of the Constitution.

Juries and judges may take into account their **observations of the behaviour of witnesses** in the well of the court which could not have been made by counsel, but only if they reveal what they have seen to the parties. A court which acts on its understanding of a document in a foreign language without informing the parties commits a breach of the rules of natural justice.

More recently:

EOX17 v Commonwealth of Australia [2019] FCA 1118

In this case the applicant requested that reasons for decision not be published because it would reveal medical information she wished to keep confidential:

- "During the course of yesterday in the usual back and forth of emails between myself, my staff and the Registry I was provided with several of the applicant's emails. One of these I forwarded to my associate with only this remark: '*sigh*'. Unfortunately, this email was sent through my own error to the applicant."
- "As a human, I can well understand the sentiment that underpins the applicant's suggestion that since I have insulted her the least I can do is not to publish the reasons for judgment. Were the matter governed by my desire to make amends for my error, I would readily accede to her request."
- "Unfortunately, other interests are in play. The business of the Court is conducted in public. Section 17(1) of the *Federal Court of Australia Act 1976* (Cth) ('the Act') directs that the business of the Court 'shall be exercised in open court'. The business of the Court quintessentially includes the public release of its judgments. It is an important feature of the rule of law that, so far as is possible, litigation is conducted in public and that the spectre

of secret trials is avoided. Justice must not only be done, it must be seen to be done. Consequently, if it is not seen, it is not done."

SUB JUDICE:

Sub judice contempt is the common law offence of publishing material which has *a tendency to interfere with the administration of justice* while proceedings are sub judice; that is, 'under a judge'.

- RATIONALE → for the offence is to avoid a 'trial by media' by prohibiting the publication of material which might prejudge issues at stake in particular proceedings, or which might influence or place pressure on persons involved in the proceedings, including jurors, witnesses or potential witnesses, and parties to the proceedings.
- In deciding whether material is prejudicial, the court will attempt to balance the public interest in free speech with the public interest in ensuring a fair trial.