LAWS2371 – RESOLVING CIVIL DISPUTES

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CLASS 1 – INTRODUCTION TO LITIGATION

Introduction to Litigation KVL 1.20 –1.60, 1.80 –1.90, 1.110 –1.170, 1.300 –1.330, 1.380 –1.450

Procedural Law

- "[R]ules which are directed to governing or regulating the mode or conduct of court proceedings": ***McKain v RW Miller & Co (SA) Pty Ltd (1991), Mason CJ.***
- Te object of civil procedure is:
    - To give effect to the substantive law, that is, to facilitate the judicial decision-maker in arriving at the correct decision.
    - Ensure the use of fair procedures.
    - Procedures such as the use of witnesses, discovery and appeals exist to allow for the right
    - Decision to be reached and to produce a fair trial
    - Procedural law regulates the way in which substantive rights are claimed and enforced.
- It is the method of proceeding to enforce a right, and is not concerned with the law that establishes or defines the particular right. It is described as 'adjectival' 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.
- The substantive law is governed by the *lex loci delicti*, which means that the applicable law is the law of the place where the wrongful act took place.
- Procedural law is governed by the *lex fori*, which means that the applicable laws of procedure and evidence will be the laws of the court which is hearing the claim.
- The purpose of procedural law is to provide rules to facilitate dispute resolution.
- ***Dame Hazel Genn, "Introduction: what is civil justice for?"***
    - There seems to be common agreement around the world that a critical challenge in solving the problems of cost, complexity and delay in civil justice is that of getting the rules right.
    - Procedure is important because of its link to substantive outcome.
    - Thus procedural is not only theoretically important as the route to substantively correct decision making but is an important influence on user perceptions of the fairness of legal processes.
    - The challenge, then, is to find the balance between procedures that are seen as fair, that contribute to substantive justice and that provide reasonable access to justice so that rights can be enforced, but are not so complicated or expensive as to make proceedings inaccessible.
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Sources of Procedural Law

Powers provided by Statute

- *Civil Procedure Act 2005 (NSW) ('CPA')*
- *Uniform Civil Procedure Rules 2005 (NSW) ('UCPR')*
- Other legislation: *Supreme Court Act 1970 (NSW), District Court Rules 1973, Local Court Rules 2009, Evidence Act 1995 (NSW)*

Inherent and Implied Jurisdiction

- Superior courts of record (e.g. Supreme Court) have inherent jurisdiction to regulate processes and prevent abuse of process.
- District and local have limited jurisdiction which arises expressly under statute or is derived by implication from statutory provisions conferring particular jurisdiction

Grassby v The Queen
Judgement - A magistrate's court is an inferior court...it is unable to draw upon the well undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carriers with it everything necessary for its exercise;

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- An implied power may be found where a court has jurisdiction under its statute but no provision is made in the statute for the making of an order which is necessary to carry out the court's statutory powers: *R v Mosely (1993).*
- 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 & Sons Ltd v Police Tribunal (NSW) (1986).*
    - *Pelechowski v Registrar, Court of Appeal (1999):* "In this setting, the term 'necessary' does not have the meaning of 'essential'; rather it is to be 'subjected to the touchstone of reasonableness'".

Guiding Principles for Procedure

- Overriding purpose of this Act and of the rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings – *CPA s 56*
    - *CPA s 56*
        - *(1) the overriding purpose of this act is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*
        - *(2) the court must seek to give effect to this overriding purpose when it exercises any power given to it by the cpa or by the rules of court.*
        - *(3) a party to a civil proceeding is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court*
- The court is to act in accordance with the dictates of justice in deciding whether to make any order or direction for the management of proceedings, including orders for amendment of adjournment – *CPA s 58.*
- The court must have regard to the overriding purpose and the objects of case management – *CPA ss 56, 57.*
- The court may have regard to the matters set out in *CPA s 58(2),* including the degree of difficulty or complexity of issues; the degree of expedition of parties; the degree of injustice that would be suffered by parties as consequence of order or direction.
- Court to implement its practices and procedures with the object of proceedings and their 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 – *CPA s 59*
- The court must 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 – *CPA s 60.*

Adversarial System of Civil Litigation

Main Features of Adversarial and Inquisitorial Systems

- Main features of adversarial model:
    - Party-controlled dispute
    - Use of precedent, procedural rules and laws of evidence
    - Reliance on oral testimony and cross-examination
    - The trial as climatic end of the litigation process
    - Use of trial transcript for an appeal
- Inquisitorial System
    - The judge's role is both pro-active and inquisitive
    - The main sources of law are codes with commentary from legal scholars
    - Minimal rules for courtroom practice
    - The emphasis is on documentary proof and not on cross-examination
    - There is no rigid separation between trial and pre-trial phases
    - There is no use of transcript to record court proceedings

Reforms of the adversarial System of Litigation

- There have been criticisms of the adversarial system model on the grounds that it prevents access to justice due to its cost and delay

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- Lord Woolf's report in 1995/6 in England found that the primary problem of the unrestrained civil adversarial culture was that it restricted access to justice. It recommended a number of reforms, such as early settlement of dispute, greater use of alternative dispute resolution, 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.

Civil Justice Review, Victorian Law Reform Commission, *Civil Justice Review* (2008), 71

- Funding is critical in the operation of the system - it will influence the level of judicial resources and quality of judicial and other court personnel
- Court adjudication is effective if it determines claims with reasonable accuracy, within a reasonable time and with proportionate investment of litigant and public resources
- Court adjudication is efficient if public and litigant resources are employed to maximise the effectiveness and are not wasted unnecessarily
- Lastly, court adjudication is fair if the system ensures that its resources and facilitates are justly distributed between all litigants seeking court help and between present and future litigants

"Cards on the Table" Approach to Litigation

- *Baulderstone Hornibrook Engineering v Gordian Runoff [2008], Allsop J:*
  - "it cannot be emphasised too strongly that it is the responsibility of the parties, through their legal representatives, to exercise a degree of co-operation to express the issues for trial before and during the trial. Such cooperation can now be taken as an essential aspect of modern civil procedure in the running of any civil litigation, including hard- fought commercial cases."

The Principle of Open Justice

- Principle of open justice: idea that justice is conducted out in the open where the public can see it be done
- "The principle of open justice is one of the more fundamental aspects of the system of justice in Australia. The conduct of proceedings in public is an essential quality of an Australian court of justice."; *John Fairfax Publications v District Court of NSW*
- *R v Richards & Bijkerk (1999), Spigelman CJ:*
  - "The courts should be open to all, so that anyone who wishes may see how justice is done. The privilege belongs to the public generally and no special privilege is conferred on those who report proceedings... It is only in wholly exceptional circumstances, where the presence of the public or public knowledge of the proceedings is likely to defeat the paramount duty of the courts, that the courts may proceed in camera."
- The courts can close the court to the public or it can prohibit publication of all or part of the proceedings, based on:
  - Specific legislation; e.g. *CPA s 71* and the Court Suppression and Non-Publication Orders Act 2010
  - Inherent jurisdiction of the courts.

Common Law Power to Depart from the Open Justice Principle

- This is on the basis that such orders are "really necessary to secure the proper administration of justice" in the proceedings: *John Fairfax & Sons v Police Tribunal (NSW) (1986), McHugh JA.*
- "The phrase does not mean that if the relevant order is not made, the proceedings will not be able to continue. Plainly they can. ... The basis of the implication is that if the kind of order proposed is not made, the result will be—or at least assumed to be—that particular consequences will flow, that those consequences are unacceptable, and that therefore the power to make orders which will prevent them is to be implied as necessary to the proper function of the court": *John Fairfax Group v Local Court of NSW (1991), Mahoney JA*.
- The necessity for such measures would only arise in "wholly exceptional" circumstances, not merely where such measures would be useful or desirable: *John Fairfax Publications Pty Ltd v Ryde Local Court (2005), Spigelman CJ,* or would save embarrassment, distress or financial loss: *Attorney-General (NSW) v Mayas Pty Ltd (1988)*

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Hogan v Hitch

Facts:

- Derryn Hinch, a radio broadcaster, named persons convicted of sex offences on his website and at a public rally in Melbourne.
- Their identities were under suppression order made under s 42 of Serious Sex Offenders Monitoring Act (Vic).
- Hinch challenged the constitutional validity of s 42 on the basis that Ch III of the Constitution implied that all State and federal courts must be open to the public and carry out their activities in public.

Judgement; French CJ:

- "In my opinion the better view is that there is inherent jurisdiction or implied power in limited circumstances to restrict the publication of proceedings conducted in open court. The exercise of the power must be justified by reference to the necessity of such orders in the interests of the administration of justice. Such an order may be made to and bind the parties, witnesses, counsel, solicitors and, if relevant, jurors and media representatives, or other persons present in court when the order is made, or to whom the order is specifically directed."

The Provision of Reasons for Decision

- The "provision of reasons for decision is also an expression of the open court principle": *Wainohu v NSW (2011).*

Wainohu v NSW (2011).

Facts

- Plaintiff sought a declaration that the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* was invalid.
- Section 9(1) provided that an eligible judge may make a declaration that a particular organisation is a "declared organisation" for the purpose of the Act if satisfied several conditions were met, and s 12 empowered the judge to revoke the declaration.
- Section 13(2) provided that the judge is not required to provide any grounds or reasons for the declaration or decision.

Judgement

- The provision of reasons for decisions is also an expression of the open court principle, which is an essential incident of the judicial function. A court which does not give reasons for a final decision for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function: the judicial ascertainment of facts, identification of the rules of law, the application of those rules to the facts and the exercise of any relevant judicial discretion."

The Principle of a Fair Trial

- Whilst usually the principle of a fair trial is thought of in terms of criminal proceedings, it also applies in civil proceedings. It manifests itself in the form of the obligation to provide proper notice.
- This was discussed in "The Truth Can Cost Too Much: The Principle of a Fair Trial":
    - "In Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes."
    - "The court cannot turn a blind eye to vexatious and oppressive conduct that has occurred in relation to the proceedings even if a fair trial is still possible. Such conduct could, if tolerated by the courts, undermine the standing of the judges as impartial and independent adjudicators."
    - "Courts have an overriding duty to maintain public confidence in the administration of justice."
    - "Certain principles of fair trial will be found to have a measure of constitutional protection."
    - "The obligation to obey the rules of natural justice... applies with particular force to judicial proceedings."

The Crown as a Model Litigant

- Lawyers acting for the government are required to ensure their client acts as a model litigant.
    - There was a "standard of fair play to be observed by the Crown in dealing with its subjects", and the Crown should not plead a "purely technical point of pleading": *Melbourne Steamship Co v Moorehead (1912).*
    - The courts also expect the Crown to pursue the public interest when it appears as a litigant: *Hughes Aircraft Systems International v AirServices Australia (1997).*

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- A model litigant is required to act with complete propriety, fairly and in accordance with the highest professional standards.
- NSW Model Litigant Policy for Civil Litigation:
    - 3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act
    - 3.2 Requirements
        - Promptness, no necessary delay
        - Paying legitimate claims without litigation
        - Acting consistently
        - Avoid litigation where possible
        - Keeping costs to a minimum by:
        - Not requiring the other party to prove a matter which it knows true
        - Not contesting liability if the State knows the issue lies in quantum
        - Not taking advantage of a claimant who lacks resources
        - Not relying on technical defences
        - Not undertaking and pursuing appeals unless it is justified in the public interest
        - Apologising where the state or an agency is aware that it or its lawyers have acted improperly or wrongfully

The Right to a Fair Trial Recognised in Human Rights Legislation

- *International Covenant on Civil and Political Rights, art. 14*: "All persons shall be equal before the courts and tribunals. In the determination of a criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
- *Human Rights Act 2004* (ACT) s 21: Fair trial
- *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 24: Fair hearing
- The Victorian and ACT legislation imposes an obligation on the judiciary to interpret all legislation in a way that is compatible with protected human rights "so far as it is possible to do so consistently with its purpose." If the legislation cannot be read compatibly, the judiciary does not have the power to invalidate it, but may issue an enforceable declaration of inconsistent application" (s 36, Vic; s 32, ACT). A declaration does not affect the validity, operation or enforcement of the legislation or create any person any legal right or give rise to any civil cause of action. The declaration informs Parliament that it needs to review the rights assessment of the relevant legislation.

Introduction to Litigation – RCD Textbook Ch 1, 3

RCD Ch 1: Margaret Beazley and Chris Frommer, 'The Distinctive Role of the Judge: "The Least Dangerous Branch of Government"'

What separates the judicial function from the rest of the dispute resolution spectrum is the unique institutional, constitutional and governmental context in which the judicial function is exercised.

- The judicial process is performed in public and in the public interest
- The basis of the court is constitutional or legislative
- The decision-making power of the judge is limited to publicly determined jurisdictional boundaries
- Judicial determinations are made according to law and have precedential effect as part of the rules that govern society
- The process is non-consensual
- The outcome is binding and enforceable

What is a court?

- In Australia, the question 'what is a court?' bears a particular constitutional significance having regard to the separation of powers doctrine.

Kable v DPP (NSW)
state legislation empowered the SC to order the detention of Mr Kable... where the

court was satisfied that he was more likely than not to commit a serious act of violence and that it was appropriate that he be detained in custody. The legislation was held to be invalid. It was said that the targeted and arbitrary power conferred on the court was 'the antithesis of the judicial process' and 'not a power that is properly characterised a judicial function'.

- It is axiomatic, following *Kable*, that a 'court', at least as understood in the Constitution, is a body which exercises judicial power, or powers that are not inconsistent with the judicial function.
- The exercise of judicial power is a necessary but not sufficient condition for the characterisation of a decision-making body as a court.
- Other factors include
    - The proceedings are conducted in an adversarial manner, including by the application of the rules of evidence, with witnesses being examined and cross-examined
    - The parties are entitled to make submissions to the court
    - Most importantly, that any order made may be enforced by the court
- One essential quality of an Australian court is the principle of open justice, which requires that court processes be conducted in public. There are, however, a small number of exceptions to the rule, both at common law and by statute; e.g. when case concerns trade secrets, minors, vulnerable witnesses, etc.

What is judicial power?

- There are some functions that may only be exercised by a person invested with judicial power, functioning in an institutional capacity as a 'court'.
    - The most important of these is adjudging and punishing the criminal guilt of citizens.
    - The power to enforce decisions, including, in the case of courts of record, by the power to punish for contempt.
- Arbitral proceedings lack powers of enforcement as an integral aspect of the process and require the
- assistance of the judicial process for that purpose, usually provided by force of legislation, in the case of arbitral awards

Judicial independence

- Independence from influence by other branches of government, as much as from influence by particular disputants, is fundamental to the institutional integrity of the judicial system.
- Judicial independence may be understood to require, at its core, that judges be free to determine cases according to law and that they not be constrained in their decision-making either by the conditioning of their functions by reference to political approval or by political pressure being threatened or brought to bear on the judge personally.
- The central structural pillar of judicial independence is security of tenure. Its principal feature is protection from removal of office except by extraordinary means—most commonly by vice-regal order on an address in Parliament seeking removal on the ground of 'proved misbehaviour or incapacity'.
- Most jurisdictions also provide by statute for a mandatory retirement age, although the age varies among the jurisdictions. A linked issue, sufficiency and security of remuneration, also has a bearing on judicial independence.

Judicial impartiality

- Judicial independence is distinct from but related to the notion of impartiality and its counterparts, actual and apprehended bias.
- Actual bias typically involves prejudgment of the case at hand. The principle of apprehension of bias provides that a judge is disqualified from hearing a case 'if a fair minded lay observer might reasonably apprehend that the judge might bring an impartial mind to the resolution of the question the judge is required to decide'.

Procedural fairness

- The requirement to afford procedural fairness is another feature which lies 'at the heart of the judicial function'.

Judicial fact-finding

- The 'facts' are limited to those which have been proved by evidence or found pursuant to the statutory notion of common knowledge or the doctrine of judicial notice. Thus, judges are generally not entitled to decide cases on the basis of their own knowledge or expertise.

The duty to give reasons

- A further distinctive mark of the judicial function is the obligation to give reasons. It has been described as 'an incident of the judicial process' and a 'paramount judicial duty'.
- The duty to provide reasons is integral to the principle of open justice. It enhances public confidence in the judicial process, and provides mechanism for judicial accountability. Reasons are also amenable to appellate, academic and public scrutiny.

The principle of finality

- Another 'central and pervading tenet of the judicial system' is the principle of finality, which provides that controversies, once judicially resolved, are not to be reopened except in limited, narrowly defined circumstances. That principle is an aspect of 'the distinction between the exercise of judicial power (by the final quelling of controversies according to law) and the exercise of executive power (subject to law)'.
- Finality also provides the rationale for a number of rules of procedure and pleading, including:
    - Res judicata, which bars the bringing of a suit in respect of a cause of action which has already been judicially determined;
    - Issue estoppel, which precludes parties from disputing in subsequent proceedings an issue of fact or law already decided in prior proceeding involving the same parties;
    - *Anshun* estoppel, whereby a party is precluded from raising, in subsequent proceedings, a matter that could have been raised and determined in earlier proceedings; and
    - The rules of appellate procedure, which strictly limit the situations in which issues which were not raised at trial, or evidence which was not adduced, may be raised or adduced on appeal.

Judicial lawmaking

- The exercise of the judicial function in a particular case can have two outcomes:
    - The resolution of the instant dispute as between the parties, a feature that is in common with other dispute resolution processes, and
    - The creation of precedent by way of legal principles which are binding in future cases, a feature unique to the judicial process.

RCD Ch 3: Michael Legg and Sera Mirzabegian, 'The Vitality of Litigation'

Application and development of the law

- Litigation is the practical way in which the rule of law is secured, as it involves the application of the law and the vindication of rights. Litigation is not just about the peaceful resolution of disputes; it is about preventing injustice, not just for the litigants but for society in general.
- Litigation may be a necessity when what is sought to be enforced is a 'right'.
    - Rights - human to fundamental rights
    - Constitutional issues/gov. regulations
    - Subset impacts wider society i.e. securities laws.
    - Environmental litigation.
    - Private rights - contracts, torts.
    - Society at large to endorse/conmen certain acts based on their consistency with the laws.
- Some disputes are not susceptible to resolution by private arbitration because they are seen as being in the exclusive domain of a national court.
- A further source of elaboration is those disputes which, even if settled, require court approval.
- Litigation results in the development of precedent which guides the future action of all members of society.
- Some disputes may not turn on the recognition of a right because the existence of the right is unequivocal.
- In such cases, the application of the right to a factual situation can take place outside the courtroom

- Further, commercial disputes about contractual or property rights may not require the recognition or enforcement of the right but, rather, the identification and remedying of harmed business interests, which may include a quantification of compensation for rights that have been breached.
- Notwithstanding the desirability of rights protection and precedent production through litigation, proponents of litigation must still accept three realities.
    - First, the initiation of litigation is a voluntary act on the part of the plaintiff.
    - Second, courts encourage settlement and thus the loss of rights-recognising or precedent-making opportunities.
    - Third, while the elucidation of rights and development of precedent may advance the public good,
- it is the individual litigants in a particular case that must bear the emotional and financial cost of litigation.

Procedural protections

- The procedural protections afforded to parties through the litigation process – impartial adjudicator, a reasoned decision, open justice, notice and an opportunity to be heard and present a case based on evidence and argument – may encourage parties to use litigation in the resolution of their dispute.
- Procedural protections may be particularly significant where power imbalances exist.
- However, power imbalances, especially due to a lack of resources, can also be exploited in litigation
- It is possible to adopt procedural protections in ADR processes. However, the confidentiality associated with these processes restricts external supervision – there is no open justice.

Urgent relief

- The availability of urgent relief to a disputant:
    - Interim or interlocutory injunctions: a party may seek an interim or interlocutory injunction if it has a right it wishes to establish and enforce by litigation and that right is at risk of being damages in the time before the court can determine the dispute.
    - Freezing orders: restrains a defendant from removing any assets located in or outside Australia or from disposing of, dealing with or diminishing the value of those assets and is made for the purpose of meeting a danger that a judgment or prospective judgment will be unsatisfied. The court has the power to make a freezing order against a third party in certain circumstances.
    - Search orders: for the purpose of securing or preserving evidence which might be relevant to the proceeding and if, inter alia, there is a real possibility that a respondent might destroy such material in their possession.
- The availability of interim relief in ADR
    - Pursuant to s 17(1) of the Commercial Arbitration Act 2010 (NSW), 'unless otherwise agreed by the parties', the arbitral tribunal may grant interim measures at the request of a party, including orders to
        - Maintain or restore the status quo pending determination of the dispute
        - Take action that would prevent harm or prejudice to the arbitral process
        - Provide a means of preserving assets out of which an award might be satisfied
        - Preserve evidence relevant and material to the resolution of the dispute
    - The arbitral tribunal does not have any power to grant interim measures prior to the commencement of the arbitral proceedings. Further, the arbitral tribunal cannot grant interim measures on an ex parte basis.

Compelling disclosure of information

- One of the advantages of litigation is that it compels the disclosure of information through processes such as preliminary discovery, discovery and subpoenas.
- The preliminary discovery provides a good example of when recourse to the courts will not only be desirable but essential in order to resolve a dispute.
- Once proceedings have been commenced, the compulsory disclosure of information in litigation occurs through discovery and subpoenas.
- Parties involved in mediation cannot be compelled by the mediator to produce documents by a discovery or subpoena. In the case of a domestic commercial arbitration, the parties may obtain discovery if they have agreed that discovery is to be part of the arbitration process, and, failing such

agreement, the arbitral tribunal may conduct the arbitration in 'such manner as it considers appropriate' which may or may not include discovery.

Access to the state's enforcement mechanisms

- In some cases, a party's interests may be best served by litigation because litigation provides a quick and
- efficient route to accessing the state's enforcement mechanisms.
- Three types of cases where this might occur:
    - First, where the opponent is thought to be dishonest
    - Second, where the opponent is unable to honour a negotiated settlement
    - Third, where the dispute is unlikely to be defended

Steps in Civil Litigation

- Pre-commencement
- Filing and Service of Originating Process
- Filing and service defence and cross-claim
- Discovery/Issue Subpoenas
- Filing Evidence – Affidavits
- Trial
- Appeal
- Enforcement
- ADR can take place at any time
- Tactical Decisions – e.g. security for costs, offers of compromise

Refresher on the NSW Court System – KVL 1.460-1.640

The NSW Court System: An Overview

Supreme Court of NSW

- Can hear all matters that are not within the exclusive jurisdiction of the federal courts
- Unlimited civil and hears the most serious criminal cases
- Common law division
    - Hears civil matters where more than
    - $750,000 is claimed
    - Hears criminal and administrative law matters
- Equity division
    - hears cases involving commercial law, corporations law, equity, trusts, probate, family provisions legislation
- Appellate divisions
    - Court of appeal
    - Court of criminal appeal

District Court of NSW

- Jurisdiction in Civil and Criminal matters
- Civil jurisdiction has a limit of $750k
- Unlimited jurisdiction in claims for damages for personal injury arising out of MVA or work injuries

Local Court of NSW

- Small claims division
    - Claims up to $10,000
- General division
    - Claims between $10,000 and $100,000
    - Jurisdictional limit of $60,000 for personal injury or death claims
    - Can also hear criminal summary prosecutions, committal hearings, matters concerning mental health issues, some family law matters, children's criminal proceedings, juvenile prosecutions and care matters, licensing issues and coronial matters

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CLASS 2 – ALTERNATIVES TO LITIGATION

KVL 4.10 – 4.244

Alternative Dispute Resolution

- It falls to the lawyer to educate the client as to the options for dispute resolution: *Solicitors' Rules r 7.2; Barristers' Rule r 36* – obligation to inform client of alternatives to litigation unless solicitor believes on reasonable grounds that client already has such an understanding so as to allow client to make decision that suit their best interests in relation to litigation.
- ADR is defined by the National Alternative Dispute Resolution Advisory Council (NADRAC) as: "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them"
- The word 'alternative' is misleading as it suggests that ADR, as opposed to litigation, is the less common form of dispute resolution. ADR is increasingly referred to as "appropriate dispute resolution" in "recognition of the fact that such approaches are often not just an alternative to litigation, but may be the most appropriate way to resolve a dispute."

Growth of ADR

- Victorian Law Reform Commission reports that "settlement rates for ADR are often very high, usually between 50% and 85%".
- ALRC: There is nevertheless a pervading consciousness in legal practice that litigation is the possible conclusion of any contract, trust or deed of conveyance drawn up or any legal advice tendered... such a perspective necessarily brings with it a time-consuming, complex and costly regime directed at covering every circumstance and eventuality.
- Julie Macfarlane, The New Lawyer: How Settlement is Transforming the Practice of Law:
    - The rights-based model assumes that the source of conflict is in all circumstances an uncompromisable moral principle or an indivisible good.
    - Over-reliance on and dedication to a rights-based approach carries the risk of blindness to alternative strategies or the dismissal of these as being less than “real” lawyering strategies. ... More troubling still, it generally overwhelms a consideration of other sometimes more appropriate ideologies of practice (such as business or commercial considerations).
    - Despite the limitations on problem solving in a rights-based model, the danger of exploitation of superior resources, and the risks of over-commitment, a rights-based approach to legal disputing remains essential to the rule of law. ... Lawyers must understand, respect, and promote rights entitlements. In some cases that implicate rights, negotiation or compromise may be a sign of failure or an unjustified or coerced accommodation.
    - [Lawyers] should recognise that [disputes] will usually be resolved through negotiation, which will take place in the shadow of the law and rights entitlements but not be determined by it.
    - A zero-sum game is a conception of bargaining in which one side's loss is the other side's gain... the only way to settle is to divide up this so-called "fixed pie"... in some acceptable way.
    - Lawyers understand legal negotiation as zero-sum because they approach negotiation as an adjunct of litigation.
    - Instead of arguing "for" or "against" certain outcomes, lawyers provide better service to their clients when they examine the various possible benefits that they could negotiate on their behalf.
    - The acquisition and development of information is regarded as being primarily about winning rather than about understanding and elaborating the clients' needs, developing shared facts, or understanding more about the other side and possible mutual gains. When information is only about winning, a culture of secrecy and non-disclosure develops in legal negotiations that borders on the paranoid.
    - The growth of ADR has been attributed to the difficulties that litigants have with accessing justice in the adversarial system of litigation. The adversarial system's disadvantages, such as delay and cost, support the use of ADR. The detrimental effect of the adversarial process on the relationships between the parties, especially where the litigants have an ongoing commercial relationship, is also responsible for parties adopting ADR.

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- Civil Justice Review
    - Benefit of ADR – Allow access to justice, faster, save time and money, permit more participation, flexible and creative, cooperative, reduce stress, remain confidential, produce good results, more satisfying
    - Disadvantages – Suitability, lack of court protections, lack of enforceability, disclosure of information, cost of ADR, delay, fairness, delaying tactics, inequality
- Stephen Subrin, "A traditionalist looks at mediation: it's here to stay and much better than I thought":
    - The lawyer must deal with witnesses (including one's own) who forget, lie, misperceive, or are otherwise mistaken.
    - Much behaviour is ambiguous, as are many documents. One does not know in advance which evidence will be admitted, yet alone which evidence will be believed, or which tiny shred of evidence the fact finder might latch onto as the most important. With the increasing use of experts, one has the added uncertainty of whether one's experts will survive the [admissibility] test, let alone whether the expert will be believed...
    - Given the multiple points of uncertainty, it is very difficult to advise the client with any degree of precision. At best, the attorney can advise as to a range of possible results, some of them extremely unpleasant to the client. Settlement is a rational means of avoiding the risk of the possible results that would be worse than settlement.
- Macfarlane, J, The New Lawyer: How Settlement is Transforming the Practice of Law (2008)
    - Corporate and Institutional Clients
        - "Historically, corporate and institutional clients nominate legal representatives to be both managers and agents in a dispute on assumption that knowledge of lawyer was sufficient to resolve problems changing in last 30 years as they recognise business-like approach to legal service
        - "Rising legal costs demand for less costly methods of dispute resolution to avoid the absorption of corporate resources in litigation
        - "Less prepared to be passive and more inclined to resolve matters efficiently with more active involvement usually
        - "Growth of in-house counsel
- Phillip Armstrong, "Why we still litigate"
    - Another major reason business organisations continue to litigate is because certain cases should be litigated.
    - Generally, companies tend to litigate rather than employ ADR when:
        - An important principle is involved, A need for legal precedent, a need to send a message to the marketplaces, Settlement would open the floodgates to frivolous litigation, The claim is so large that the "discipline of litigation" is called for, The claim is bogus, The law is heavily weighted in its favour, Senior management is unalterably opposed to settlement, There are multiple parties such that consensus on settlement will be difficult to achieve
- Owen Fiss, "Against Settlement"
    - A settlement will thereby deprive a court of the occasion, and perhaps even the ability to render an interpretation... To be against settlement is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.
- Carrie Menkel-Meadow, "Whose dispute is it anyway? A philosophical and democratic defence of settlement (in some cases)"
    - "Best" aspects of settlement
        - Consensual settlements represent the goals of democratic and party-initiated legal regimes
        - A broader range of possible solutions
        - Compromise actually represent a moral commitment to equality, precision in justice, accommodation, and peaceful coexistence of conflicting interests
        - Based on important non-legal principles or interests, which may be as important or more important to the parties than "legal" considerations
        - More humanely "real", democratic, participatory and cathartic than more formalised processes

        - May be better adapted for the multiplex, multiparty issues that require solutions in our modern society
        - Provide both more and better information for problem solving, as well as "education" of the litigants.
- Moffit, M, *Three Things to be Against ("Settlement" No Included)* (2009)
    - In practice, litigation and settlement are intertwined.
    - " Settlement takes place within confines of parameters established by prospect of litigation or 'bargain in the shadow of the law'
    - " Prospect of post-settlement litigation governs settlement behaviours and outcomes.
- French CJ, Perspectives on Court Annexed ADR (2009)
    - Courts as Third Branch of Government
    - Court-annexed ADR integrates the various options and provides principled basis for their connection to the judicial process.
    - Maintains that it should be the courts and only the courts which carry out adjudication function involving the exercise of judicial power (Constitution)
    - Supports the provision of court-annexed ADR services as aid to earlier resolution of litigation, case management tool
    - Must not compromise the constitutional function of the judiciary in the process

Types of ADR Processes

- NADRAC, Dispute Resolution Terms, the use of terms in (Alternative) dispute resolution
    - Facilitative dispute resolution processes: a dispute resolution practitioner assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. E.g. mediation, facilitation and facilitated negotiation.
    - Advisory dispute resolution processes: a dispute resolution practitioner considers and appraises the dispute and provides advice as to the facts of the dispute, the law, and, in some cases, possible or desirable outcomes, and how these may be achieved. E.g. case appraisal, expert appraisal, case presentation, mini- trial and early neutral evaluation.
    - Determinative dispute resolution processes: a dispute resolution practitioner evaluates the dispute and makes a determination. E.g. arbitration, expert determination and private judging
    - Combined or hybrid dispute resolution processes: dispute resolution practitioner plays multiple roles. E.g. med-arb
    - Adjudication: the parties present arguments and evidence to the adjudicator who makes a determination which is enforceable by the authority of the adjudicator.
    - Arbitration: the parties to a dispute present arguments and evidence to the arbitrator who makes a determination
    - Case appraisal: case appraiser investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved
    - Case presentation (mini trial): the parties present their evidence and arguments to dispute resolution practitioner who provides advice on the facts of the dispute, and, in some cases, on possible and desirable outcomes and the means whereby these may be achieved.
    - Conciliation: the parties to a dispute, with the assistance of the conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.
    - Facilitation: parties identify problems to be solved, tasks to be accomplished or disputed issues to be resolved with assistance of facilitator.

Negotiation

- Negotiation involves no third party whose role is to facilitate, advise or determine the resolution of the dispute. The parties are very much left to their own devices as to how the negotiation process should proceed and what the substance of the negotiation should be about.
- Jackson ADR Handbook:
    - Advantages of negotiation
        - Flexible
        - Cost effective – limited amount of special preparation required

        - Clients retain complete control of the outcome
    - Drawbacks
        - Success depends on how well the dispute has been researched and analysed
        - Weak or poor outcome for a person
        - Informality
        - Expectations are unrealistic
        - Parties are too entrenched in their positions
- Positional vs. interest-based negotiation
    - Positional negotiation is traditionally associated with lawyers and also referred to as zero-sum game approach to negotiation as it mirrors litigation in the sense that one party's gains are another party's losses, resources are limited and must be divided, and information is precious and must be protected.
    - Interest-based negotiation
        - Focuses on exploring and satisfying interests rather than focusing on competing positions, such as who is right or wrong.
        - Interests has a broad meaning as it refers to why the person wants a particular outcome thus encompassing needs, desires, fears and concerns which can be reflected in both the substance and of the dispute as well as the procedure used in the dispute.
        - Positional negotiation tends to focus on what a person wants as compared to interest-based negotiation which focuses on why they want it.
    - Fisher, Ury and Patton developed "Best Alternative to a Negotiated Settlement" or BATNA: requires a person to consider what their best position would be if the negotiation fails.
    - Positional bargaining may be an effective way to proceed in some categories of negotiation.

Comparison of Positional and Interest-Based Negotiation

Positional negotiation	Interest-based negotiation
- Parties are opponents or adversaries - Goal is to win or give up as little as possible - Assert correctness of position/demand - Make minimal concessions in relation to position/demand - Avoid disclosure of information— communication is limited - Assert rights that support position/demand - Disagree with opponent's position - Make concessions slowly and incrementally to try and obtain agreement	- Parties are collaborative problem-solvers - Goal is to satisfy all parties' interests - Identify interests - Develop options—expand the pie - Share and seek out information—communication is enhanced - Determine independent criteria for assessing options - Listen to parties explication of their interests - Evaluate options to satisfy interests

- In positional bargaining the law is often put forward as recognising the rights that support the position taken by a party.
- In interest-based negotiation the law may be utilised to determine a person's BATNA and to develop independent criteria.
- The independent criteria may include reference to substantive law in the sense of precedent or legal principles that may provide guidance as to how a court would resolve the dispute but law is but one criteria that may be relevant.

Mediation

- Mediation is the most widely used form of ADR.
- It involves a facilitated negotiation aimed at reaching an agreement. A neutral third party (mediator) assists and facilitates an agreement between the parties. Unlike litigation where the parties must convince the judge of the correctness of their position, the parties do not seek to convince the mediator but rather to persuade the other party.
- The mediator is chosen by parties unless mediation is connected to a court. The mediator usually directs process but has no advisory or determinative role.
- Nadja Alexander's Mediation Metamodel:

    - Expert advisory mediation – Mediator employs specialist legal or technical skills to guide the parties towards a settlement within a positional bargaining framework
    - Settlement mediation – Mediator specialises in process but aims to guide the parties towards a settlement within a positional bargaining framework
    - **Facilitative** mediation – Mediator specialises in process but employs **interest-based** negotiation and encourages parties to develop their own solutions
    - Wise counsel mediation – Mediator is selected for standing in community and adopt interest-based negotiation to encourage parties to develop solutions
    - Tradition-based mediation – Similar to wise counsel with consideration of interests beyond the party e.g. community and society
    - Transformative mediation – Mediator specialises in process but goes beyond interest-based negotiation with view to restore relationships – Restorative justice model e.g. family disputes
- Facilitative mediation
    - Ask questions to test the strengths and weaknesses of each side's case
    - Help parties to identify what they really need or want to achieve
    - Encourage parties to think about the likely outcome of litigation and costs
    - Help parties focus on underlying objectives and needs
    - Help parties work on a creative solution that is in their best interests
    - Help parties negotiate more effective
    - Will not express a view on the merits of a party's case or evaluate the likely outcome of the dispute or put forward their own proposals for settlement.
- Evaluative mediation
    - Employ all or some of the steps to facilitate resolution
    - Go further if asked and evaluate some issues or claims and suggest settlement options
- Steps in a mediation (note: flexible)
    - 1. Mediator sets out rules to parties and legal representatives
    - 2. Opening statements by both parties
    - 3. Identify issues and develop agenda
    - 4. Explore issues; mediators encourage and guide discussion
    - 5. Confidential private sessions where mediator tests and develops options
    - 6. Evaluate options and/or offers
    - 7. Parties negotiate an agreement or terminate the mediation
    - 8.Agreement is prepared and signed

Why Choose Mediation

- Required to mediate by law or contract
- Faster and cheaper
- Narrow the issues for litigation
- Confidentiality
- Broader or more flexible remedies
- Maintains relationships
- Greater client satisfaction
- Compared to negotiation, process is more structured and a framework for exploring resolution can be
- followed.
- There is an independent third party who can break impasses, facilitate the devising of solutions and generally keep the parties focused and moving forward. The mediator can seek to diffuse strong feelings or antagonism between the parties. The mediator can test suggested solutions put forward by a party.
- But may be unsuitable where:
    - A party desires to create precedent,
    - Urgent interlocutory injunctions are needed
    - A party is not trustworthy or prepared to participate in good faith
    - Parties have no authority to resolve issues
    - Power imbalances

Role of the Lawyer

- Advise if the dispute is suitable for mediation

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- Describe the process of mediation to client
- Contact the other party or mediator
- Negotiate on client's behalf
- Prepare the matter for mediation
- Attend the mediation
- Reduce power imbalances and seek to protect the client's interests
- Draft a settlement agreement
- Lawyer involvement
    - Absent advisor: assists the client to prepare for the mediation but does not attend the mediation session itself
    - Advisor observer: same role as absent advisor, but attends the mediation; observes and advises client as requested
    - Expert contributor: engage with one another during the mediation about the legal issues and view on the applicable law.
    - Supportive professional participant: lawyer and client work as a team, working collaboratively towards an acceptable outcome
    - "Spokesperson": speaks on behalf of the client throughout the mediation.
- Donna Cooper, 'Representing clients from courtroom to mediation settings: switching hats between adversarial advocacy and dispute resolution advocacy'
    - Initial advice: provides clients with honest assessment of legal rights and encourage realistic expectations as to the settlement or litigation outcomes
    - Lawyers have duty to advise clients of settlement options.
    - Educate clients about their participation in litigation or mediation process
    - In a litigation context, information must be placed before the court in a manner that complies with procedural requirements and the rules of evidence.
    - In mediation, lawyers and clients need to have organised all information relevant to making an informed decision in relation to settlement.
    - Legal representatives will need to acquire an understanding of their clients: e.g. what they are seeking to achieve and their personal and financial situation.
    - High-level communication skills are essential.
    - Lawyers have a duty to follow the client's instructions.
    - There is also a set of knowledge and skills that are specifically relevant to non-adversarial advocacy.
    - When preparing for mediation it will assist to have an understanding of the underlying causes of conflict and of the client's underlying interests. Lawyers can encourage clients to thin about their underlying concerns, needs and interests and some of the possible causes of conflict.
    - Before organising mediation, a discussion needs to take place with the client as to whether there are any factors that could lead to an inequality in bargaining power: e.g. psychiatric or psychological disorder or physical disability; cultural issues; language difficulties
    - Lawyers can assist their clients to prepare to participate in integrative negotiations, which include interest- based strategies, and the use of trade-offs and concessions ("logrolling").
    - Advisory mediation: the mediator is not independent of the content of the dispute, but can give information and advice, and actively encourage the participants to reach an agreement. E.g. evaluative mediation
    - Facilitative mediation: more independent, assisting parties to generate their own options and come to a resolution, without offering views about appropriate settlement options.

RCD Textbook Ch 2, 4

RCD Ch. 2: Tania Sourdin, A Broader View of Justice?

What is justice?

- Traditionally: Justice as a virtue where its existence was demonstrated by abidance with law and fairness.

  - Representation of 'justice' as a female or even a childlike figure have grown over the past three centuries to the point that, in many Western countries, the figurine is seen to represent both justice and law.
  - This representation is relatively recent, as from the 14th century it seems that the depiction of justice was more likely to be linked to the notion of 'heavenly justice', with artwork more commonly featuring biblical scenes such as the 'Last Supper' with justice imagery increasingly being linked to religion
  - The female justice figure can represent the attributes of justice that include even-handedness and rationality (the scales), fairness (the blindfold) and courage (the sword).
  - Increasingly, courts are using more abstract depictions of justice. In these depictions, modern justice is more likely to be portrayed as a set of ethical values and as a virtue (not as a goddess or deity).
- Access to justice
  - More recently, the concept of justice has been linked to the exploration of access to justice notions or to notions of procedural fairness and justice.
  - Lord Woolf: 'Referring to the principles that must be adopted by the civil justice system in order to achieve objectives within that system.
  - Cappelletti: the first wave of the access to justice movement was aimed at addressing the economic barriers to accessing courts and litigation and in particular at supporting and enhancing legal aid. The second wave of the movement focused on addressing the 'organisational obstacle' to accessing justice ... The so-called third wave of the access to justice movement was concerned with procedural obstacles to securing justice.
  - The first assumption [of access to justice movement] was that the court system is capable of upholding the rights of disadvantaged people in a timely and cost-effective manner.
  - Legal aid funding would continue to support accessibility and much of the access to justice rhetoric was focused on creating a rights-based system with an expanding court system
  - The third wave of the access to justice movement no longer located the formal legal system as the sole domain of justice.
  - Cappelletti and Garth: This 'third wave' of reform includes but goes beyond advocacy, whether inside or outside of the courts, and whether through governmental or private advocates. Its focus is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies.
- Procedural justice
  - On the one hand, procedural justice in the context of modern courts is linked to case management and ensuring that an accurate decision is reached after following appropriate procedures.
  - On the other hand, other procedural justice theorists have concentrated on procedural fairness from a social science and psychological perspective. Focuses on not only what is done but also how people perceive the justice experience.

<u>Justice beyond courts</u>

- Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.
- Genn: **<u>[ADR] does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving... the outcome of mediation, therefore, is not about just settlement; it is just about settlement.</u>**
- This analysis is based on the assumption that mediation does not require participants to focus on rights. In many mediations, the legal framework and the understanding of the legal rights of parties will be a critical issue in determining whether or not parties negotiate and how.
- Fiss: ADR may either render the parties unequal or exacerbate inequities; 'authority' and capacity of individuals to enter into agreements that may be contrary to other interests; compliance with outcomes reached as a result of settlement and the capacity to review arrangements' ensuring that public adjudication was retained in view of its importance in relation to supporting society.
  o Numerous studies have reported that disputants view ADR processes as 'fair'.

- Can be made pre-trial and/or during the trial.
    - S 131A indicates this

Client Legal Privilege

- Client legal privilege is a rule of substantive law and CL immunity: Daniels Corporation International Pty Ltd v ACCC.
- The privilege attaches to oral/written communications between:
    - Lawyer and a client;
    - Lawyer and a third party e.g. expert witness; or
    - Third party communication e.g. expert report.
- The dominant purpose for the communication must be considered –privileged if:
    - Communication was created for the dominant purpose of legal advice: s 118 EA, or
    - For use in litigation: s 119 EA.
- The privilege may be waived by the client: Mann v Carnell, but legal practitioner has ostensible authority to waiv privilege on behalf of their client even if it is against their express instructions: *Esso*.
- The privilege can be claimed in pre-trial and trial procedures, and in non-judiciary inquiries and all forms of compulsory disclosure e.g. search warrants: *Baker v Campbell*.
- The privilege may be abrogated by statute e.g. s 3ZQR Crimes Act in relation to serious terrorism offences

Rational for Client Legal Privilege

- Client legal privilege facilitates proper legal advice by promoting open communication between lawyer and client.

Australian Federal Police v Propend Finance (1997) 188 CLR 501

McHugh J

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisors, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.

Three Important Principles

1. Inherent tension between need to protect client, and the public interest of ensuring parties have access to all relevant evidence.
2. The subject matter of privilege is communications, not documents per se.
3. Legal professional privilege is a rule of substantive law, which is necessary for the administration of justice – is a necessary corollary of the rule of law.

Dominant Purpose Test to Determine Client Legal Privilege

- Elements of legal privilege are
    - A professional relationship between lawyer and client (note s 120 of the *EA*)
    - Confidential communications; and
    - Created for the dominant purpose of legal advice or litigation
- Meaning of 'purpose':
    - It is the purpose in existence at the time of the making of the confidential communication/document: Barnes v Commissioner of Taxation.
    - Evidence needs to establish the circumstances of creation – evidence is required in relation to the following:
        - Whether or not a person claiming privilege is a client in line with s 117 definition;
        - Whether or not a communication/document is confidential in line with s 117 definition;

- Whether or not a communication/document was made for the dominant purpose of providing legal advice to the client/legal services relating to a relevant proceeding; and
- Whether or not a proceeding is anticipated in which the client might be a party.

- Copies of non-privileged documents can be privileged if the copy is made for the dominant purpose of legal advice or for the use in litigation: Commissioner Australian Federal Police v Propend Finance Pty Ltd.
- CL test for privilege is also the dominant purpose test: Esso Australia – overruled the 'sole purpose' test.
- In Sydney Airports, the 'dominant purpose' test is objective, but the subjective intention of the person creating the communications has some weight.

Evidence Act	
S 117	*Definitions*
S 118	*Legal Advice*
S 119	*Litigation*
S 120	*Unrepresented Parties*

Esso Australia Resources Ltd v Commissioner of Taxation (Cth) (1999) 201 CLR 49

Facts

- Esso claims legal professional privilege in the context of discovery

Gleeson CJ, Gaudron and Gummow JJ

- The evidence Act test only applies in the Federal Court of an ACT Court
  - NSW has enacted legislation in the same terms
- Evidence act provisions relate to 'adducing evidence'
  - BUT, privilege is not limited to just adducing evidence

Common Law of Legal Professional Privilege

- The test for privilege must balance between two considerations – frank communications between lawyer and client, and unfettered access to relevant information.
- The 'sole purpose' test was too narrow – if interpreted literally, then the existence of one other purpose would defeat privilege.
- The 'dominant purpose' test strikes the right balance and brings Aus law into conformity with other common law jurisdictions.

In the Matter of Southland Coal (2006) 203 FLR 1

Judgment – Austin J

1. Rule of Substantive Law
   a. legal professional privilege is a rule of substantive law (not just a rule of evidence), which is affected by the term of the Evidence Act.
2. Two-Stage Process
   a. Court must be satisfied that;
      i. Communication satisfies ss 118-119; and
      ii. Production of documents would result in disclosure of confidential communication
3. Onus
   a. The party claiming privilege bears the onus of establishing the basis of the claim and the party seeking production does not bear the onus of excluding privilege --> *ASIC v Rich*
   b. Party claiming privilege must establish the facts on whcih the the privilege is capable of being asserted; *National Crim Authority v S*
   c. Onus ir pvoed on the BOP; s 142 *EA*
4. Legal Advice
   a. Understood in the pragmatic sense- it applies to telling the client about the law, and advice 'prudently and sensibly' done in the relevant legal context
      i. Advice must be given in the lawyers professional capacity
5. Whether disclosure would result from adducing the evidence

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a. Whether what is disclosed by adducing the evidence explicitly reveals the confieential communication or supports the inference of the fact (within definitive and reasonable foundation) as to the contetn of the confidential information
    i. Disclosure does not occur if what is adduced in evidence causes the reader to 'wonder or speculate' whether legal advice has been obtained; *AWB Ltd v Cole*

6. Communication between third party and client
    a. Communications will be protected if the function is to enable the client to obtain legal advice, and the third party is so implicated in communications between client and legal adviser as to bring the third party's work product within privilege: Pratt Holdings Pty Ltd v Commissioner of Taxation.
7. Purpose of the Question of Fact
    a. The purpose for which the communication is made or a document is created is a question of fact (*ESSO).*
    b. Purpose and intended use must be determined objectively
8. Dominant Purpose
    a. Determined objectively with regard to all the circumstances in which the communication was made and its nature: Grant v Downs.
        i. Objective view of all evidence including evidence of the author who created the communication, and person under whose direction the document was prepared.
        ii. If document was prepared irrespective of intention to obtain professional legal services, it will not satisfy the test: Grant v Downs.
        iii. The existence of another purpose will not be fatal, but if there are two purposes of equal weight then it is unlikely one will dominate the other.
9. A claim for privilege will not succeed if the document is a commercial document brought into existence in the ordinary course of business
    a. Nature or purpose of document may illuminate the purpose; *Seven Network*
10. Failure to call relevant witness
    a. If party asserting privilege has capacity to call direct evidence but does not do so, the court is entitled to infer this evidence would not have assisted the person's case: Ho v Powell.
11. Inspection by the Court
    a. Court has the power to inspect the document itself to determine a claim for privilege: Grant v Downs.

<u>Proof of Client Legal Privilege</u>

- The client who is making a privilege claim has the burden of proving the claim
- From *AWB Ltd v Cole* (no 5) (2006) 155 FCR 30
    - The onus might be discharged by evidence as to the circumstances and the context in which the communications occured or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by arguements or submissions

<u>Loss of Client Legal Privilege</u>

- Privilege can be lost - ss 121-126 *EA*
    - May be lost where
        - It would prevent enforcing a court order: s 121(2);
        - There has been a waiver: s 122 – section incorporates CL test of waiver in Mann v Carnell. Waiver can be by consent (s 122(1) ; or
            - whent a client has acted in a way which is inconsistent with the maintence of the privilege (s 122(2)
            - when a client has knwoingly and voluntarily disclosed the substance of the evidence (s 122(3)(a), (4), (5)
            - when the substance of the evidence has been disclosed with express or implied consent of the client (s 122(3)(b), (5)
        - There are joint civil clients: s 124;
        - A communication or document was made to commit a fraud/or by deliberate abuse of a power: s 125.
        - Another communication or document is necessary to enable a proper understanding of a document that has lost privilege due to ss 121 – 125: s 126.
- Section 122 was amended in 2009 to adopt the CL test of waived

LAWS2371 – RESOLVING CIVIL DISPUTES

Evidence Act	
S 121	Loss of Client Legal Privilege: Generally
S 122	Loss of client legal privilege; consent and related matters
S 123	Loss of client legal privilege; defendants
S 124	Loss of client legal privilege; joint clients
S 125	Loss of client legal privilege; misconduct
S 126	Loss of client legal privilege; related communications and documents

Man v Carnell (1999) 201 CLR 1

Facts

- Mann was a surgeon who commenced legal proceedings for breach of contract and defamation against the ACT Board of Health – this settled for $400 000.
- Mann wrote a letter to his local member (Moore) describing litigation as a 'monumental waste of public funds' – member then wrote to Carnell (Chief Minister of ACT) seeking response.
- Carnell included a copy of legal advices from ACT barristers in the matter – this was established practice when inquiries were made by members.
- Member was told advice was subject to confidentiality, so returned the material without copying it.
- Mann applied for preliminary discovery for the legal advice on the basis they contained defamatory imputations – believed he had a cause of action against Carnell. Carnell claimed privilege.

PRIOR PROCEEDINGS:

- ACT Supreme Court ruled privilege did not apply. On appeal by Carnell, Full Court held privilege did apply.

ISSUE:

- Whether legal professional privilege was lost by subsequent disclosure to the member.

JUDGMENT (Gleeson CJ, Gaudron, Gummow and Callinan JJ):

- Waiver may be express or implied:
    - Implied waiver – whether particular conduct is inconsistent with the maintenance of the confidentiality, which the privilege is intended to protect.
        - If conduct is inconsistent, waiver is 'imputed by operation of law' – law determines the consequences of the inconsistencies, even if they are not reflective of the party's subjective intention: Benecke v NAB
    - In Goldberg v Ng, disclosure to a third party for a limited and specific purpose does not waive privilege – party disclosing to one third party does not imply they intend to waive disclosure in all other circumstances.
- In this case, the privilege was that of body politic – 'disclosure to a third party' is an over-simplification of the circumstances.
- Purpose of privilege was to enable the ACT to seek and obtain legal advice in relation to Mann's litigation, without being prejudiced by subsequent disclosure of advice (inc. subsequent disclosure to Mann) -> disclosure to a local member on a confidential basis was not inconsistent with the purpose of privilege.
- If Moore had been given copies of the legal report on the basis that he could show Mann, that would have waived privilege because it would be inconsistent with the confidentiality protected.
- Other circumstances where privilege may be waived:
    - Disclosure by client of confidential legal advice received by the client, for the purposing of explaining/justifying their actions or for some other purpose will waive privilege if disclosure is inconsistent with the confidentiality the privilege protects.
- Considerations of fairness may be relevant
- Privilege was not waived

Fenwick v Wambo Coal (no 2) [2011] NSWSC 353

Facts

- Fenwick called for production of documents referred to in Wambo's affidavit. Wambo described all but one document (a surveyor's report) as confidential legal advice protected by privilege.