MLL391 Civil Procedure and Alternative dispute resolution

Topic 1 - Introduction

Introduction

Civil procedure is the law which analyses and governs the conduct of the judicial system in dealing with proceedings before the Court. It is the law which governs the process for the resolution of disputes.

In each of the States and Territories around Australia there are a number of Courts which are of plenary jurisdiction, intermediate jurisdiction and inferior jurisdiction. Each of these Courts are adeptly named the Supreme Court, District and County Counts and Magistrate and Local Courts respectively. The Federal Jurisdiction is exercised by three superior courts and a inferior one respectively.

These Courts are the High Court – which has both a federal and appellate jurisdiction – the Federal Court of Australia, the Family Court of Australia and the inferior Federal Magistrates Court. The proceedings conducted in the Federal Courts involve Common wealth or Federal legislation as opposed to jurisdictional based legislation held in each of the respective States and Territories.

The entire purpose of civil procedure is to apply the law to individual disputes in a manner which is fair, economical and expeditious which the parties choose to submit to the Court. The Court is expected to apply and demonstrate the effectiveness of the la w in addition to signifying that the judicial sys tem in Australia has qualified judges which are capable of interpreting, developing and applying the law around Australia.

The key procedural issue around Australia is the balance between effectively and fairly applying the law and discouraging disputes which are ineffective and overload the Courts leading to the delay of individual cases which consequently clog the system.

Substantive and Procedural Law

Substantive law is the statutory or written law that governs the relative rights and obligations of those who are subject to it within their jurisdictional State. It defines the legal relationships between people within a respective jurisdictional State. This is contrasted with procedural law, which is the relevant processes and rules which enable a State to hear and determine a civil or criminal hearing. Procedural law relies on due process and administrative to hear a case and assess it on its merits .

The primary differences between the two is that:

A. Substantive rules of law effectively define the rights and duties,

B. Procedural rules of law provide the capabilities to enforce and administer justice over those rights and duties.

The rules of procedural law ar e said to be 'adjectival' rules in the manner that they attempt to quantify certain substantive rights. JA Jolowicz in 'On the Nature and Purpose of Civil Procedural law' (1990) *Civil Justice Quarterly* 262 at 270 states that there are, however, two important differences between procedural and substantive law such that

- Subjection to substantive law is involuntary, whereas recourse to procedural is voluntary. The person who supposes or know himself or herself to be possessed of a substantive right is no t compelled to enforce it by litigation.

- Substantive law is self-executing, where procedural law creates choices for the parties or a series of choices. Where a procedural rule is mandatory in form , if the opponent chooses to do nothing about it, nothing will happen.

<u>Sources of Law</u>

Inherent Powers

Every Superior Court - including the Federal Court of Australia as decided in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 535 and the Family Court of Australia *Taylor v Taylor*(1979) 143 CLR 1 - to control its own processes and procedures to ensure that all of its orders are upheld and complied with respect to how they deliver justice.

Inherent power ensures that superior Courts have such power, as necessary, to ensure that their procedures are fully cap able of rendering just and fair outcomes in respect of the litigating parties. As stated in *Riley Mckay Pty Ltd v Mckay* [1982] 1 NSWLR 264 – the purpose of inherent power is to allow Courts to regulate their processes an d prevent abuse of relevant judicial procedure.

Inherent Powers typically involve:

- Mareva Injunctions - *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612

- Anton Piller Orders - *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 1 All ER 7 79

- Staying orders or strike out claims in respect of process abuse - *Metropolitan Bank Ltd v Pooley* (1885) LR 10 App Cas 210

- General Orders as required by the to act effectively - *R v Forbes; Ex parte Bevan* (1972) 127 CL R 1

Inflexibility and Formality

Courts follow strict rules of procedure and evidence which the law prescribes in order to protect litigants. Often, these rules seem illogical to lay persons. Consider these factors which, hopefully, highlight the point that is being made under this point:

- It is the parties themselves who place the issues before the court for determination. A judge cannot decide an issue if it is not before the court;
- A judge may be prohibited from asking questions of the parties and witnesses save and except for clarifying what has been said;
- Parties and witnesses are confined to answering the questions they are asked. If they want to give a further explanation, they are told they cannot;
- Parties and witnesses are stopped whenever their evidence includes irrelevant material; they are often prevented from introducing in their evidence facts they have heard from others, even though reference to those facts is, in the minds of the parties and witnesses, essential to their own evidence. Thy feel as if they can't tell the court their side of the story!
- All this takes place in a formal and competitive atmosphere. They are placed in a prominent position with all eyes concentrated on them;

Adversarial Nature of Litigation

Our system seems to foster aggression and discord. Parties and witnesses feel that they are 'members of a team' and that if they fail to come up to expectation or gives away too much in cross-examination, they have 'let the team down'.

Restrictions on Claims and Remedies

A court of law makes findings of fact and law that are open on the pleadings which the parties themselves have drawn. A judge is prevented from 'venturing' away from the case as pleaded by the parties.

Topic 2 – Jurisdiction

Before a Court can judge a case or an appeal, it must consider whether it has appropriate jurisdiction to actually hear the arguments presented by the parties.

Jurisdiction is essentially the territorial power bestowed upon a Court to make a binding ruling against the parties relevant to the subject matter presented before it.

Exam application

Issue: Does the court have the jurisdiction to hear the case?
Rule: Supreme Court must have:

1. **Subject matter jurisdiction:**
    - Section 85 Constitution Act Vic – Jurisdiction of the Supreme Court
        - The Supreme Court shall have jurisdiction in all cases
        - Unless curtailed/prevented by other legislation
2. **Territorial jurisdiction:**
    - Court also requires a sufficient level of jurisdiction over the defendant or *in personam* jurisdiction

Common Law: Presence
A fundamental aspect of civil procedure is that the defendant has a presence in the jurisdiction of the Court. At common law, the jurisdiction of the Supreme Court to hear a case against a defendant depended on that defendant being served with a writ whilst that defendant was in Victoria: *Laurie v Carroll* (158) 98 CLR 310

At common law, the jurisdiction of the Supreme Court to hear a case depends on the defendant being within the state. Given a writ cannot be legally served, the court cannot exercise any jurisdiction over the defendant.

Transfer of proceedings (In Australia)

Issue: Can the proceedings be transferred to a more appropriate court?
Rule: Pursuant to Section 5(2)(b)(3) of the Cross-Vesting Act, each court has the power to hear cases from other courts jurisdictions in addition to providing a mechanism for a case to be transferred to a more appropriate court in the interests of justice.
Circumstances of transfer:

- Range of proceedings in another court in another state or;
- **In the interest of justice to a more appropriate court**: Court must carry out a nuts and bolts management decision in the assessment as to which court is the more appropriate court: ***BHP Billiton v Schultz 2004 HCA***

Factors relevant to transfer: *Irwin v The State of Queensland*

- Which jurisdiction does the action have the most real and substantial connection? Which state has the biggest connection of this cause of action? ***DG v Commonwealth Serum Laboratories SCV 1991, BHP Billiton v Schultz 2004 HCA***
    - Which court has the most connecting factors with the proceedings

- The natural forum: Where the incident occurred, it is a very important factor if there are specific laws which govern the action/dispute: ***Schultz***
- Any choice of jurisdiction clause in a contract***: Beston Parks Management Pty Ltd v Sexton & others Vic Supreme Court***
- Availability of witnesses,
- Convenience and expense
- The places where the parties reside
- Where they carry on business
- Where the cause of action arose
- The interest of justice is not the same as the interest of one party – there are other interests wider than those of either party to be considered
- Other factors might be relevant in the interest of justice
- Court had to balance the competing factors

It is not necessary to show that the court of which proceedings commenced was clearly inappropriate to hear the case: ***Schultz***. All that is necessary is to show that the second court is MORE appropriate

Cf ***Mutch v BHP Billiton & others SC Vic 2015 to Schultz.***
Mutch The natural forum (should be transferred to court w/ most connection) is the starting point in deciding where the interests of justice lie, but there might be counter-veiling factors/circumstances which would lead away from the concept of natural forum. In ***Schultz*** (HCA), placed much importance on natural forum factor (court where court of action arose) –

Purpose of the Cross Vesting Act

- The Cth and State parliaments in 1987 enacted the Jurisdiction of Courts (Cross-Vesting) Act and both these acts are identical (State & Federal)
- The act applied to the following courts;
    - Federal Court
    - Family Court
    - Supreme Court

The Act had 2 main purposes

1. To establish a cross-vesting scheme between the above courts
    - Each court would be conferred the power to hear cases of the other courts
    - Each of these courts were invested the jurisdiction of each other
        A. Supreme Court of each state and territory were vested with the jurisdiction of the Federal court and the Family court
        B. Federal and Family court was invested with the jurisdiction of the state courts

2. Provide mechanism for the transfer of proceedings to the more appropriate court in the interest of justice
    - **RE Wakim 1999 HCA**: The HC held that part of the cross vesting legislation was Constitutionally invalid to confer state jurisdiction on Federal Courts
        - Federal Courts could not hear State Matters
    - However, HC held the following as valid;

- Re Wakim does not invalid the Cross-vesting scheme in total – State courts could hear Federal Court matters
- Those provisions of the scheme which confer state jurisdiction on courts of other states remain valid
- Those provisions which facilitate the transfer of cases from one court to another are also valid
- Only thing invalid; conferring of state jurisdiction on Federal Court matters

Topic 3 – Instituting Proceedings

Instituting proceedings involves a prudent combination of client care, through to fact finding and research and ascertaining the core legal issues which are relevant to the case. A number of different procedural rules govern the commencement of proceedings in each of the respective Courts and client-care regulations also require that certain steps are taken before the client can engaged in any litigation whatsoever.

Types of Complaints

***A Matter**:* A matter has only one other party to the proceeding.

***A Cause**:* An action is a cause that is commenced by a statement of claim (originally called a *writ of summons* as per *Herbert Berr y Associates Ltd v Inland Revenue Commissi oners* [1978] 1 All ER 161) and requires two or more parties. Evidently, the cause of action th at the plaintiff is relying on to litigate is the fun damental legal issue - such as an action in ne gligence or a breach of contractual duties a nd so forth.

A cause of action is effectively a set of facts which justify a plaintiff's right to sue. It encompasses at least both a legal remedy that the action is relying upon in addition to a sufficient remedy which the plaintiff is seeking.

***A Motion**:* The other main form of the initiating process is the motion. A motion is used in open Court where one party applies for a favour outcome (often the terminology that i s used in *Law and Order* such as 'I motion for a recess your Honor'). A motion commonly arises *inter partes* (between the parties) at the interlocutory stage where the parties lawyers ar e disputing a particular point relating to the case such as discovery – and they will make a motion to the Court to resolve it. They can a lso be *ex parte* (from or by a party).

Commencing Proceedings

The relevant time of filing, commencement or 'issue' is when the writ is sealed by the relevant Court registrar and accepted by the Court Registry. The writ and the number of copies of the writ as required by the Court are stamped by the respective Court registry.

2 ways in which an action can begin

1. Plaintiff filing a writ which is either generally endorsed or with a statement of claim attached to it: Used in disputes of factual issues
2. Through an originating motion: Used when parties are seeking court's opinion on a particular matter e.g. the interpretation of a document

Once writ is issued, the plaintiff must serve on the defendant within 12 months of issue. If not, the writ is stale: Order 5 Rule 12

Disputes on Factual Issues

Introduction

The orders of pleadings consist of the plaintiff's statement of claim, the defendants answer called the defence, followed by optional or additional pleadings called the reply. The statutory definition of pleadings is different in each State and the relevant Rules of Court much be referenced for the exact definition.

Pleadings must only contain a statement in brief summary format of the material facts on which the party pleading relies for their claim or defence, but must not include evidence.

The Writ

The writ of summons is the main type of originating process used in Australia and must contain an indorsement putting the defendant on notice of claim. If the dispute involves factual issues, then a proceeding must commence through a writ as per the Rules of Court.

A writ must contain an indorsement – either a general or a statement of claim which attempts to frame the notice of the claim and alert the defendant to the nature of the dispute.

- ***General Indorsement*** – Not a pleading rather a statement which attempts to frame the notice of the claim. The rules of each relevant jurisdiction determine the content of the indorsement and most require some detail of the claim and the relevant remedy. Usually used to initiate an action before the action becomes statute barred (When limitation period is almost over)
  - Order 5 Rule 4.2(B)
  - A paragraph that shows the basis of which the plaintiff asserts a right of relief against the defendant
    - A. A statement sufficient to give with reasonable particularity notice of the nature of the plaintiff's claim
    - B. The cause there of
    - C. The relief or remedy that is sought by the plaintiff

  General indorsment that fails to meet order 5 rule 4.2B is irregular. The court may set aside or order amendments. It does not render the writ null and void: ***Ruzeu v Massey Ferguson 1983 VCSA***

- ***Statement of Claim*** – A statement of claim that is contained within the writ that pleads the cause of action. It should detail that the plaintiff has a right to relief as well as a material summary of the facts.
  - Order 5 Rule 4.2(A)
  - Contains all the facts that constitute a cause of action, the relief sought by the plaintiff

<u>Topic 11 – Costs</u>

Exam template
General rule: Section 24 of The Supreme Court Act confers upon the court a discretion as to the order of costs**.** Similarly, O63r2 SCR gives the court that same discretion. Pursuant to both provisions, a court has a discretion as to costs, which party will pay the costs and at what amount.

In the ordinary run of the mill case, the unsuccessful party will pay the costs of the successful party on a standard cost basis (Costs follow the event) pursuant to o63r30. The rationale for this rule is those who bring weak cases or who mount weak defences should pay the costs occasioned by their stubbornness**.**

However, the court's discretion as to costs is very wide and it is to be exercised judicially and thus on proper grounds, the judge cannot be spurious. However, in some instances, it can be unclear as to who the winner and loser is in the case.
Order **26 rule 8 outlines the consequences for failing to accept an offer for compromise**

The courts discretion as to costs
Section 24 SCA and o63r2 gives court power to make any order for costs it deems appropriate. Under s24 is to be exercised subject to the SC rules. An award of costs are not intended to indemnify a party for all the expenses that that party has incurred, costs on a standard cost basis are intended as a <u>partial indemnity</u> for the successful party. Costs not given as bonus or penalty as its function is to compensate for the liability of his/her own lawyer's professional costs in conducting the case. Costs will not cover a parties time lost/travel expenses.

Costs against a non-party
Because costs are discretionary, the wide discretion that the courts have can cover an award of costs against a non-party however the circumstances are required to be **<u>exceptional</u>**
Knights v FP Special Assets 1992 HCA: The discretion to award costs extends beyond the parties formally named on the record. Jurisdiction sufficiently wide to make a liquidator liable for costs, Order for costs should be made against a non-party if it is just to do so. 'Where the party to the litigation is insolvent, where the non-party has played an active part in the conduct of the litigation"

E.g. liquidators, insurance companies etc.

Costs against lawyers
O63r23: Where a lawyer for a party has made costs to be made improperly or wasted resources (lack of competence, unnecessary delay and adjournments etc.) or negligent in the way the matter is conducted, the court may make cost orders against the lawyers.

Costs on a solicitor own client costs (the costs a client has to pay his/her own solicitor)
Order 63r59 (Costs on a standard basis): A client has to pay their solicitor which are reasonable incurred and of reasonable amount
O63r60: Solicitor can recover costs from their client even though they were not reasonably incurred, and of not reasonable amount, if those costs were incurred with the authority of the client and the lawyer had **expressly warned** the client that those costs might not be recovered from the other side.

Type of cost awards
Courts will normally exercise discretion by ordering loser to pay costs of the winner. However, cost awards do not and are not intended to compensate parties for unnecessary expenditure.

Costs on a Standard Basis* (*60-70% of OP costs)
In the ordinary run of the mill case, the court will exercise its discretion to award costs on this basis. Doubtful items are disallowed on a standard basis.
O63r30 SCR, O63r31 SCR
Those costs are taxed on a standard basis: O63r30. This means that on taxation, on a standard basis, all costs reasonably incurred and of a reasonable amount will be allowed

Costs pursuant to this are ordered in the usual run of the mill case where costs follow the event

Must consider what is reasonable in the circumstances. It doesn't include costs due to extravagance or over-caution

Taxation – itemised bill (each item is able to be checked by the court); cost being claimed must be of a reasonable amount and reasonably incurred

Costs on an indemnity basis: (100% of OP costs)
O63r30.1: This type of cost award differs from the standard basis costs
Doubtful items will be disallowed on a standard basis whereas doubtful items will be allowed on an indemnity basis unless they are clearly unreasonable. It depends upon the circumstances of the case which are capable of warranting the court to depart from the usual rule.

When will a court allow an indemnity basis as distinct from a standard basis?
GT Corporation Pty Ltd v Amarie Safety Pty Ltd 2008 VSC

1. Because of the settled practice which exists, the court ought might no usually make an order for the payment of costs on any other basis than the standard cost basis
2. **The circumstances of the case must be such as to warrant the court in departing from the usual order (standard cost basis) –** must be a special or unusual feature in the case to justify the court from departing from the ordinary standard basis costs.

Examples:
- If one party makes allegations of fraud against the other, knowing it to be false
- Misconduct on the part of one party that causes loss of time to the court and the other party
- If proceedings are commenced or continued for some ulterior motive or if proceedings are commenced or continued in wilful disregard of known facts or clearly established law
- An imprudent refusal on a offer to compromise
- If the case involves an abuse of process
- If one party is in breach of undertakings given to the curt or if there has been an contempt of court
- The unsuccessful party has prolonged the trial by deliberate false defences and allegations of fact
- If it appears an action has been commenced or continued in circumstances where the P should of known that it had no success
- If the D should of known that it had no chance of success, especially if the D had been warned by the P or the court
- If there has been a failure to disclosure a relevant document, if the trial has been commenced, and without any explanation one party produces a doc which wasn't discovered or disclosed, the court may award delinquent party to pay costs on an indemnity basis
    - Indemnity costs are to punish one party for their conduct through the proceedings

Offers

Exam template

The policy objectives of an offer

It is in the public interest that settlement be achieved between the parties as soon as possible. Settlements are regarded as highly desirable and the rules are designed to encourage frank communications between the parties. Provided the offer/communications were made in a genuine attempt to settle, the contents of the offer cannot be disclosed to the court until the time that liability has been decided.

There are two mechanisms available for making an offer before verdict.

1. Through informal means that is a letter containing the offer or;
2. A formal offer of compromise

The offer of comprise shifts the burden of costs to instil a heightened sense of realism into the negotiations between the parties (the costs shift to plaintiff). The procedure is to intended to promote early offers of settlement through shifting the burned of costs, an additional risk if added to the litigation process.

Features of an offer

The formal offer of comprise must be in writing and must state that the offer is made in accordance with order 26 Supreme Court Rules (The rule is applied when P is awarded money). The offer of comprise must be served before the verdict and has to be opened in the period specific in the offer of comprise and if not time limit is specified, it must be open for 14 days.

If the formal offer of compromise is rejected?

O26r8 outlines consequences

Under the offer of compromise rules, plaintiffs and – in more limited circumstances, defendants are presumptively entitled to at least some of their costs on an indemnity basis if they have made a generous offer to settle, which has been rejected by the other side. But in absence of such provisions, the presumption is that cost swill be awarded on a particular basis, and a decision to deport from that basis requires that there be special circumstances that warrant doing so.

Problematical Winner

The D will pay costs to the P from the date the writ was issued until the offer was made. From that point on until verdict, the P will have to pay the D costs

A party receives at trial an amount that was less than a previous offer made

Introduction

A vast majority of cases are resolved without the need of a trial. However, it is in the public interest that litigation be brought to an end as soon as possible. It is in the public interest that settlement be achieved between the parties as soon as possible. Settlements

are regarded as highly desirable and the rules are designed to encourage frank communications between the parties.

Provided the offer/communications were made in a genuine attempt to settle, the contents of the offer cannot be disclosed to the court until the time that liability has been decided.

The facts of the negotiation may not be admitted as evidence without the consent of the party. **Any letter containing the offer, should have the phrase written 'without prejudice save as to costs'**. Contents of the letter can not be used until the question of costs arises

2 mechanisms available for making an offer before verdict

1. Through informal means that is a letter containing the offer.
2. Formal offers of compromise: O26 SCR contains a procedure for one party making a formal offer of compromise (Can be P or D).

The policy objectives of the offer of compromise

The offer of comprise shifts the burden of costs to instil a heightened sense of realism into the negotiations between the parties (Costs shift to plaintiff). The procedure is to intended to promote early offers of settlement through shifting the burned of costs, an additional risk if added to the litigation process .The defendant is required to produce a document called 'offer of comprise'. The document is sent to the plaintiff's lawyers but the judge doesn't know about it.

The difference between a formal offer of comprise and an informal offer of comprise via a letter (a negotiated settlement)

An offer of comprise must be left open for the period that the offer is stated to be opened. If there is no period, the offer must be left open for period of 14 days. It can not be retracted. **The court is obliged to take into account the formal offer of comprise**, it will not override the courts discretion, but the circumstances have to be exceptional before the court will override the consequences of failing to accept offer of comprise other than what **O26r8 specified.**

If the formal offer of compromise is rejected, O26r8 outlines consequences if an offer of comprise is rejected.

If the informal letter rejected the court has a **direction** whether OR NOT to order costs on a different basis other than a standard basis.

The features of an offer

- The offer of comprise must be genuine under order 26, both the P and D can make an offer of comprise.
- An offer of comprise is made without prejudice

- An offer of comprise without prejudice is not admissible as evidence as an admission
- The communications made in the course of negotiations are protections from disclose to prompt settlements
- The formal offer of comprise must be in writing and must state that the offer is made in accordance with order 26 SCR
- The offer of comprise must be served before the verdict and has to be opened in the period specific in the offer of comprise and if not time limit is specified, it must be open for 14 days
- The offer can be accepted anytime before judgment or verdict
- Failure to accept the offer of comprise produces the consequences spelt out in **o26r8**

Broadly speaking, if P wins:

- If the P at the trial is awarded a sum less than what was offered, this is the thrust of o26r8.
  - The plaintiff will get costs from the date the writ was issued until the formal offer of comprise is served.
  - The defendant gets costs from the date the offer of compromise was made to the date of verdict
- The offer of comprise is intended to force the parties to confront the issues of liability before proceeding to trial as president mason said ***Morgan v Johnstone*** 1988 litigation is incredibly chancy. The reason why the cost consequences are the way they are is that:

  If there has been a non acceptable for a formal offer of comprise and the p gets less than what was offered, the reason why the P has to pay the costs to the D, was because litigation was a direct result of the P own attitude

Calderbank offers

Introduction

A calderbank offer is an informal offer of compromise or informal offers. A calderbank offer is in a letter and headed without prejudice and thus cannot be given in evidence as an admission of liability. The court will consider a without prejudice offer, in making an order for costs.

In *Calderbank v Calderbank* [1975] 3 All ER 333 the court recognised informal offers.

Contents of the letter

- The letter should contain the words "without prejudice, save as to costs"
- The letter must obtain the time period the offer will remain open (the offer can be withdrawn anytime from it was offered)
- The offer contained in the letter must be clear and precise – must indicate exactly what the offer is. The person receiving the offer must know what is offered.
- The letter should also specially state what costs advantage the offeror will seek in the event the matter proceeds to judgement – indemnity vs standard basis costs
- The reasons why the offer should be accepted