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LECTURE 2: PRE-LITIGATION AND CASE MANAGEMENT; LITIGATION TECHNOLOGY

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- Uniform Civil Procedure Rules 2005 (NSW) – Part 20

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- Reading 4: Case Management and the Overriding Purpose
- Reading 5: Matching Disputes with Processes
- Reading 12: Changes
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- Reading 24: Discovery of documents and information technology

READING 3: COURT-ANNEXED ADR

Two reasons for ADR in Australia has been the increased incorporated, referral by Australian courts of mediation and arbitration processes, and procedural requirements to resolve a dispute before litigation. In most jurisdictions, courts have power to refer all or part of a civil dispute to an ADR process. Court rules have incorporated ADR into the case management system.

Court-referral makes ADR accessible to many litigators who may not be aware of the process before they come to court. It promotes appropriate use of ADR where the parties or their lawyers are accustomed to the litigation process. Other advantages of court-annexed ADR include a lower cost, and court-monitoring quality of the professionals.
One of the most disadvantages is that the parties do not perceive the process as voluntary. Parties who expect courts to decide the issues may misunderstand the process. The availability of the ADR processes might take the pressure for reform off the court system. The issue of high cost of access cannot be resolved by diverting the case to ADR. It should not be considered as a second-class justice for the poor.

Federal Courts

Civil Dispute Resolution Act 2011 (Cth)
The object of this Act applies to Federal and Federal Circuit Courts to ensure that people take genuine steps to resolve disputes before civil proceedings are instituted. Under this legislation, the court may have regard to 'genuine steps' requirements in exercising powers and performing its function (s 11).

Federal Court Rules 2011 (Cth)

Court-annexed ADR are dealt with in Pt 28 of the FCR. Parties must consider options for ADR, including mediation, as early as possible: FCR r 28.01. A party may apply for an order that the proceeding be referred

LECTURE 3: ADVOCACY AND PROBLEM SOLVING; FACILITATIVE PROCESSES; DETERMINATIVE PROCESSES

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READING 6: ALTERNATIVE DISPUTE RESOLUTION

Majority of disputes are resolved through informal means, sometimes with the help of other intermediaries. The adversarial system of litigation does not work all the time. First, the financial costs of litigation are high. Second, litigation is not easy. It often involves hostile methods, combined with time delays. Third, litigation only deals with the legal issues between the parties. On the other hand, while litigation does not resolve many kind of disputes, neither does informal dispute resolution. If conflict venters, parties can experience emotional trauma etc.

Types of ADR processes

The most common processes used in Australia are arbitration, mediation, conciliation, facilitation and early neutral evaluation. Depending on the nature of the dispute and circumstances, one more of methods may be used to form part of a dispute resolution process. The main processes are divided into two types: those which the outcome is determined by the disputing parties (*facilitative*), and those where the outcome is determined by a neutral third party (*determinative*).

Determinative processes include adjudication, arbitration, expert determination, private judging, fact-finding, early neutral evaluation, case appraisal, and mini-trial. *Facilitative* processes include facilitation, conciliation, mediation and ombudsman.

It must be determined who resolves the dispute, and in what way the procedure is conducted?

Determinative processes

Determinative processes involve a third party making a decision or determining the dispute, usually after hearing arguments and evidence. The outcome – particularly adjudication and arbitration – is enforceable through the courts. This process is made for the benefit of the parties and may be enforceable to the extend provided for by contract between parties.

ADR and the Legal Profession

There are a range of matters related to ADR that lawyers may be involved in including:

- Obligations to use ADR as a precondition to litigation;
- Ethical obligations to swear that a client's case has reasonable grounds for success;
- Preparing information used in the ADR process
- Advising on the legality, workability or enforceability of the process
- Providing advice and assistance where appropriate.

READING 7: ADVOCACY AT MEDIATION

Advocacy by Lawyers at Mediation

Mediation focusses on satisfying the interest and needs of the parties to a dispute, and not vindicating legal entitlements. Advocacy at mediation is different to advocacy in the courts. Mediation assists the parties to negotiate a resolution of their dispute. While the mediator controls the process, he or she has no power to determine the outcome.

For a lawyer representing a client at mediation, advocacy encompasses the following tasks:

- Understanding the mediation process and ensuring clients understand;
- Understanding the roles that a lawyer can play;
- Understanding the dispute, client's interests and needs and what is necessary to satisfy them;
- Assisting the client to seek other resolutions
- Advising the client of the likely best and worst outcomes

READING 8: RESPONDING TO CONFLICT: DISPUTE MANAGEMENT PREFERENCES

Alternative ways of responding to conflict

1. *Lumping it*: the issue is simply ignoring the relationship which the offended continues.
2. *Avoidance*: end a relationship by leaving it. The decision to avoid conflict is based on powerlessness.
3. *Coercion*: imposing the outcome by using threat or force.
4. *Negotiation*: mutual settlement of conflict by both parties without the third party.
5. *Mediation*: involves a neutral third party who intervenes in a dispute to help the parties reach an agreement.
6. *Conciliation*: It is used in agencies. The conciliator will have to ensure that the terms of settlement are compatible with the legislation. It is not usually voluntary for the respondent, who can be ordered to participate.
7. *Arbitration*: both parties consent to the intervention of a third party.
8. *Adjudication*: intervention of a third party that has authority to intervene, make a decision and enforce it.

LECTURE 4: CASE ANALYSIS: PARTIES AND CAUSES OF ACTION

READING LIST:

Reading 21: 'What's the Problem?': Choosing an Optimal ADR Process for Resolution of Conflict

Reading 22: Court Adjudication in Civil Justice System

Determination

In determinative processes, the parties provide information to a neural third party who makes a determination based upon the facts. Some of the alternatives to the court are determinative processes such as arbitration and expert determination.

Arbitration gives disputing parties access to the independent nature that a court would not apply. Arbitration may involve multiple arbitrators, with different areas of subject matter expertise.

Expert determination focusses on questions or points of law, or on another expertise that does not require extensive testing of evidences. Therefore, determination is based primarily on an interpretation of the expert material presented.

Advice

The advice may be about what process to adopt but is about content: subject matter of a dispute. Subject matter expert expresses a view that is not binding on the parties.

Facilitation

The third ADR process mode is facilitative. A basic definition is acting in a way that makes easier the tasks of other. In dispute resolution, facilitative processes are those in which the third party is an expert in process. The role of the third party is to assist communication and provide the parties with a regular reality test. In commercial disputes, the main common type of facilitated dispute resolution process is mediation.

Mediation Options

Mediation forms or types may be classed as:

- Problem solving
- Transformative
- Expert mediation

COURT ADJUDICATION IN THE CIVIL JUSTICE SYSTEM

What is Civil Procedure

Procedural law is the law which governs the conduct of proceedings before the court. Civil Procedure is seen as a process for the resolution of civil disputes.

Sources of Civil Procedural Law

Statutory Jurisdiction

The rules of civil procedure in superior courts are made by the legislature, the executive and the courts themselves. The legislative source of civil procedure in the states and territories is the Supreme Court Act. Each jurisdiction has a statute which sets up the parameters for its procedures.

These acts provide that procedural rules may be made by delegated legislation. The rules of the courts were originally made by the legislature, but now derived by rules committees, which are composed of judicial officers and representatives of the government and the legal profession.

Inherent jurisdiction

Supreme Courts have an inherent jurisdiction deriving from their status as superior courts of record. The inherent power, as an incident of judicial power provides superior courts with power to ensure that their procedures are capable of producing just outcomes. The overall purpose of the inherent jurisdiction is to allow the courts to regulate their process and to prevent abuse of process: *Riley McKay Pty Ltd v McKay [1982] 1 NSWLR 264*.

Adversarial and Inquisitorial Models of Litigation

Civil Procedure systems have been classified between adversarial and inquisitorial procedural models. Under the adversarial model, two adversaries generally take charge of the procedural action, while under inquisitorial system, officials perform most activities.

Principle of Open Justice

The principle of open justice confers benefits on the administration of justice; for example, acting as a bastion against the exercise of arbitrary power by judges, proving judicial performance etc.

LECTURE 5: INITIATING PROCEEDINGS: COMMENCING LITIGATION

Case Analysis: *Gunns Ltd v Marr* [2005] VSC 251

Practice and Procedure – Pleadings – Statement of Claim – necessity for certainty in pleadings – function of particulars.

Facts:

- ➔ The first plaintiff (Public Company) engaged in timber industry in Tasmania. It processes timber at Mills at Hampshire and Triabunna, Exports timber to Japan and other overseas countries.
- ➔ Second and Third plaintiffs are individuals who carry on the business of timber harvesting in partnership with each other.
- ➔ 13 December 2004: Plaintiff's file a Writ to commence proceedings against 17 individuals and 3 corporate entities. It claimed damages. Aggravated and exemplary damages, injunctions and costs for disruption of the plaintiff's business allegedly caused by various tortious actions of the defendants.
- ➔ 1 July 2005: Plaintiffs filed a summons seeking leave to deliver an amended statement of claim. They served the defendants with the amended statement of claim that day. It is a 360-page document.
- ➔ The amended statement of claim made a number of claims against various of the defendants, each which relate to a specific area of the first plaintiff's business and/or a specified time period.
- ➔ *[Exact Paragraphs on page 9 of Case Reader]*.
- ➔ Plaintiffs amended statement of claim consisting of 9 separate sets of allegations, 5 designed as logging operations disruption campaigns. 4 constitute instances of alleged corporate vilification.
- ➔ Counsel for plaintiffs explained the Campaign against Gunns as resulting in greater damage to the plaintiffs than the sum of the damage suffered by them.
- ➔ Plaintiffs pleadings does not allege that all defendants engaged personally in the act, but seeks to implicate them in liability by allegations of agency, involving corporate defendants as principals.

Held – The Proposed Amended Statement of Claim

- ➔ Campaign Against Gunns: one interference and disruption against the fist plaintiff by unlawful mean. They consist of paragraphs against number of individuals and organizations. Such allegations are 40 paragraphs in statement of claim. These allegations employ acts which is sought to attribute the individuals.
- ➔ Paragraph 12: reference to amended statement of claim. Paragraph 526 expands the concept of the Campaign Against Gunns.
- ➔ Plaintiffs conceded that some amendments were required to some parts of this pleading.
- ➔ Court ought to permit the amended statement of claim to stand with leave granted to the plaintiff to make further amendments.
- ➔ *Wharf Properties v Eric Cumine Assoc* said: *It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate it and said that it should be allowed to continue unspecified in the hope that he may be able to reconstitute his case and make good what he then feels able to plead and substantiate*.
- ➔ Defendants submitted that not only should the amended statement of claim be struck out but that judgment should be entered for their clients against the plaintiffs. Such submissions should be rejected. Plaintiffs should have the opportunity to undertake that revision on strict terms. Any new statement of claim must be filed and served within 4 weeks.