1. Introduction

What is procedural law? — cf. Substantive law

- = the law which governs the conduct of proceedings before the court (= a means to an end)
- = process for resolution of disputes, rules & practices which regulate formal adjudication of civil disputes in court

- = “the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right” — [Poyser v Minors (1881)]
  - i.e. of Substantive law which creates rights e.g. Contract/negligence
- Meant to regulate the way in which substantive rights and obligations are claimed, proved & enforced, without impacting on the definition of those rights
  - Machinery to facilitate enforcement of substantive rights

- 2 impt distinctions btwn the operation of substantive & procedural law
  - Subjection to substantive law is involuntary, whereas recourse to procedural law is voluntary — 1 is not compelled to enforce a substantive right by litigation
  - SL is self-executing, whereas PL creates choices for the parties — even where PL is mandatory in form, nothing will happen if the opponent chooses to do nothing about it

Sources of procedural law

- Legislative source
  - Judiciary Act 1903 (Cth); Fed Court of Australia Act 1976 (Cth); Supreme Court Acts
- Delegated legislation — Rules of Court
  - Rules committees comprised of judicial officers & reps. of the gvnt & legal profession
  - Delegated legislation are subject to parliamentary disallowance after being tabled
- Inherent jurisdiction of the court entitles the court to issue practice notes & directions
  - Usually commentaries issued by officers of court to assist parties in preparing litigation
  - Not legally binding but courts may ensure compliance by exercising their inherent power to make an order against a party, e.g. Order for costs

Adversarial/Inquisitorial models

- Adversarial — 2 adversaries generally take charge of the procedural action [common law]
- Inquisitorial — officials perform most of the activities [civil law]

** CB p19: Common vs. Civil law

- The adversarial model of litigation is premised upon party control
  - Parties are left to conduct proceedings as they see fit & according to their own timetable
  - Parties formulate the issues to be determined by the court, and are responsible for the gathering of evidence
  - JJ assumes a passive role & doesn’t intervene in the preparation/presentation of case

- Australia - A hybrid as the result of case flow management
  - While Australian civil procedure is still predominantly modelled upon the adversarial system, the last 2 decades have been characterized by an increasing interest in mitigating party control of litigation
  - Judicial officer appointed to assist formulation & gathering — a more active intervention
Case Management

- = an approach to the control of litigation in which the court supervises/controls the progress of the case through its interlocutory phase
- Emphasizes on ‘caseflow’ & ‘caseload’ management
- Involves the court managing the time & events involved
  - encourage settlement of disputes at the earliest possible stage
  - diversion of cases to alternative methods for resolution
  - Where settlement can’t be achieved, progress cases to trial at min. cost & time

[** CB p32-33: 1.9.2E]

Why Case Management

- 3 factors/objectives underlying successful case management
  - Promote efficiency, reduce delay & cost
- Reflected in VIC’s overriding objective clause (r 1.14) — ‘shall endeavour to ensure that all Qs in the proceeding are effectively, completely, promptly and economically determined’
  - Each Australian jurisdiction has their own overriding objective clauses
- But are the 3 factors/objectives actually achieved?
  - Parties certainly incurring additional costs — e.g. Cost of attending case mgf conferences
  - But no real comparison because there’s no real attempt to try and measure the delay & costs incurred before the introduction of case management

Models of Case Management

- Individual list (continuous control by a judge)
  - e.g. The ‘individual docket’ system adopted in all Federal Court registries
  - Involves each case being allocated to a particular judge who will be responsible for that case from commencement to disposition
  - Adv: The judge will necessarily have a far more greater understanding of the case
  - But things may happen which may give rise to allegation of ostensible bias on the part of the J
- Master list (requiring parties to report to the court)
  - When an event relating to a case has been dealt with, case is returned to the pool of cases to await the next event & to be assigned again, not necessarily to the same judge/judicial officer

Case Management Sanctions

- In some jurisdictions, sanctions have been created in the rules or by legislation to support the overriding objective and by corollary, case management
- Where a judicial case mgf decision is challenged, there are conflicting views as to the relative weight to be given to court efficiency & the interests of the parties to the individual case
- 2 cases illustrating the conflicting views:

[Sali v SPC Ltd] — (1993) 116 ALR 625 (CB p47)
- Appellant’s appeal was listed but appellant sought for an adjournment on the basis that a counsel was not available. The court refused. Appellant appealed to the HC arguing that the refusal to grant an adjournment resulted in a miscarriage of justice
- Appeal dismissed. Majority HCA:
In determining whether to grant an adjournment, the judge is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interest of the parties.

What might be perceived as an injustice to a party may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

[Queensland v JL Holdings P/L] — (1997) 189 CLR 146 (CB 54-55)
- The applicants who were sued by JLH sought to amend their defence. The primary judge refused leave to amend.
- Appeal allowed. — In this case, HCA placed greater emphasis upon justice between immediate parties to litigation when considering the efficacy of case management sanctions.
- Majority HCA:
  - Case management is a relevant consideration.
  - But, it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties — i.e. Ultimately need to do justice between the parties.
- Kirby J: Case mgf is a function that must be performed with flexibility & w/ an undiminished commitment to afford to all who come to the courts a manifestly just trial of their disputes.

[AON Risk Australia Ltd v Australian National University]
- Majority HCA: (clearly stated that the overriding obj is to be taken into account)
  - In [Qld], case management is but 1 consideration.
  - However, that case was decided at a time where no overriding objectives were applicable.
  - Now, the obj of case mgf are expressly stated in overriding objective provisions.
- French CJ:
  - In the proper exercise of the primary judge’s discretion, the applications or adjournment & amendment were not to be considered solely by reference to whether any prejudice to AON could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, & the lack of a satisfactory explanation for seeking it, the amendment to ANU’s statement of claim shld not have been allowed.

** N/B: It is critical to the decision that ANU had provided no satisfactory explanation as to why claim had not been properly formulated against AON. There’s a possibility that the HC would be persuaded if there’s in fact adequate explanation.
- Need to avoid re-litigation — 1 of the arguments submitted by ANU = if leave refused, then they will be forced to issue a new proceeding in order to be able to litigate.
• French CJ in response: Potential barrier of an abuse of process objection and possible estoppel the subject of *Port of Melbourne Authority v Anshun Pty Ltd*
  • i.e. This is just a threat, as the court before whom the case is brought will then say that ANU shld have litigated in the earlier proceedings

**But it is open for argument — what would have happen if new proceedings actually brought**

**INTERLOCUTORY PROCEDURES**

• Steps taken in a traditional civil proceedings — the way a civil dispute is taken to trial
  • Pre-action protocol to be followed in particular types of dispute — requires parties to engage in a series of steps e.g. ADR before bringing a proceeding
  • Led to significant diminution in the # of proceedings being filed in court

1. Normally, there’ll be a **letter of demand**
2. Followed by **originating process** of some kind — to be served on the defendants
  • May take the form of a writ or an originating motion
  • Usually a writ, certainly a writ if there’s a dispute of facts
3. D serve an **Appearance**
  • Purpose is to signify to the court and to the plaintiff that the defendant is submitting to the jurisdiction of the court and is defending the proceeding
4. Writ usually accompany by a **statement of claim**, which is the P’s pleading
  • Basically set out the facts upon which the P rely on in making the claim
  • If writ not accompanied by statement, P will be bound to do so after D’s appearance
5. D will be bound to file & serve a **defence**
  • To counter the P’s allegations in the statement of claim
6. D may have its own claim against the P & thus will file a **counter-claim** with its defence
  • Counterclaim is = a pleading of the D — May be against the P or against someone else
7. P in response to the D’s defence and counterclaim (if any) will file a **defence to the counterclaim** and may in addition file a **reply to the defence**
  • Won’t do so if only to deny D’s statement — file a reply only if P wants to say s/thing more
  • e.g. P claim contract for sale of land — D in defence said that agreement not enforceable because no memorandum signed as required by the statute
  • P won’t file a reply if just to deny, but will do so if e.g. Claim part performance
8. **Discovery** will then take place
  • Commence by way of giving notice to the other party — who would then serve an affidavit of disclosure in response
  • Assuming adequate disclosure, discovery process is concluded
  • Traditionally after discovery, there will be interrogation — i.e. Parties have a right to put to each other relevant Qs to be answered
  • But discovery by interrogation is now virtually abandoned — coz only permitted where leave of court is given — so parties reluctant to conduct the process
9. Case ready for trial — Need to wait before case actually given a date for hearing
  • Traditionally, P will give D a **certificate of readiness** for trial, D sign the certificate
  • After signed by both parties, file in the court and **notice of trial** given
  • Signify that the matter is ready to be tried
2. **Alternative Dispute Resolution**

- Litigation does not work for everyone
  - Financial costs are often so high that only the wealthy & powerful can make effective use of it
  - Legal aid generally unavailable to civil proceedings
  - Cost of justice is significant especially where legal aid/pro bone schemes not available and P is not insured — insurance often = a factor driving civil litigation + determining factor in the way of the conduct of litigation
  - Ever-widening gap btwn the cost spent & those recovered from opp. party if case successful
  - It is rarely easy — can leave parties feeling emotionally, physically & psychologically exhausted
  - As it is focused on determining a ‘winner’ through adversarial methods, the impact of the process upon the parties' relationship can be devastating
  - Only deals with the legal issues in dispute — but effective solutions to disagreements may require more than the legal determination of rights & remedies
- On the other hand, informal or extra-legal dispute resolution also does not satisfactorily resolve many kind of disputes
- So, ADR is developed to fill in the gap btwn informal, unregulated forms of extra-legal dispute resolution & formal adversarial litigation

**ADR**

- It is perhaps better to refer to appropriate dispute resolution
- = processes designed to provide disputants with procedural options that are appropriate to the dispute
- The procedures may be faster, cheaper, less adversarial and more flexible than litigation, but more structured and regulated than the disputants' own effort to resolve the conflict by themselves
- Aim to provide a broad framework for resolving disputes in ways that are accessible, effective, psychologically satisfactory and procedurally fair to the disputants
- There are many and varied types of ADR processes e.g. [CB p76]
  - **Determinative processes**
    - e.g. Arbitration, expert determination & early neutral evaluation
    - Involves a 3rd party making a decision/determination on the dispute, usually after hearing arguments and evidence — outcome enforceable through courts
  - **Facilitative processes**
    - e.g. Conciliation, facilitation and mediation
    - Involves a 3rd party providing assistance in the management of the process of dispute resolution — instead of facilitator making a decision, the process facilitates the parties’ effort to resolve the dispute for themselves — agreement/settlement enforceable at law
- The most common form of ADR is mediation

**Mediation**

- It is a process of facilitated negotiation where an independent 3rd party (the mediator) facilitates the development of consensual solutions by disputing parties.
- The parties (w/ M’s assistance) identify the issue in dispute, develop options, consider alternatives and endeavour to reach an agreement
- Typically: case being referred to mediator, who will conduct a preliminary hearing and determine how the mediation is to be conducted — process then owned by the parties & parties ultimately responsible for any resolution
• The issues raised and resolved are not limited to legal issues, and may include any range of interests and needs that are important to the parties
• Any settlement reached usually results in a signed agreement, which may be enforceable as a contract
• Mediator has **NO advisory/determinative role & can’t impose a decision/result** upon the parties
• Mediation can be conducted in its own right as a dispute resolution process (e.g. Commercial/community mediations), or can be connected to court proceedings (e.g. Family mediation)
• When connected to court, M is often assigned to the dispute rather than chosen by the Ps

(a) **Features & advantages of mediation**

- **Accessibility**
  - Quicker + more cost effective
  - Available to resolve *any* kind of dispute (whether related to legal rights) at *any* stage (e.g. Still available after trial & verdict if there’s a need to settle issues that might give rise to appeal)
  - May be structured in a variety of ways to suit the needs of the parties and may take place in a variety of settings (e.g. Not necessarily face-to-face negotiations)
  - A wide range of costs being offered (e.g. Low cost got community justice mediations *cf.* high for private mediations) — not all parties have access to the same mediation services

- **Flexibility**
  - Parties can reach agreement on anything
  - Open up a whole range of ways to resolve the dispute, in ways that the court can’t do

- **Preservation of relationship between parties**
  - Especially impt to familial and commercial relationships
  - Unlike litigation, mediation attempts to find a ‘win-win’ solution — something that both parties can live with
    - Lit = ‘win-lose’ — May even be ‘lose-lose’ e.g. If winning party get an unenforceable order

- **Voluntariness**
  - Parties take responsibility for resolving their own dispute
  - Freely agree to the choice of mediator, freely choose to participate in the process, and freely reach or not reach agreement
  - Both the mediator and the parties are free to withdraw from the process at any time without giving any reasons
  - Parties can never be forced to continue a mediation or reach a settlement
  - Consensual participation has always been a fundamental assumption of mediation and it is often stated as the basis for its effectiveness and legitimacy

- **Confidentiality**
  - Promotes candor because confidentiality is an impt aspect of mediation

- **Facilitation**

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<tr>
<th>N/B: Advantages of Litigation over Mediation</th>
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<tr>
<td>- Enforceability — A binding solution</td>
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<td>- Sets precedents — Impt in areas of law where there’s uncertainty</td>
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<td>- Sometimes there’s a need to dispute resolution to be conducted publicly e.g. Defamation claims</td>
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(b) Other mediation issues

- **Power imbalances**
  - There may be a risk that the less powerful party in mediation will accept a less satisfactory outcome than would have been decided by a neutral 3rd party, or may have such an outcome forced upon them by a stronger party
  - The mediator facilitates the parties’ self-determination and thus where there are power imbalances or where 1 party is willing (for whatever reason) to accept an ‘unfair’ outcome, mediation may produce ‘unfair’ results
  - Some kinds of power imbalance make mediation inappropriate — e.g. In situations involving domestic violence
  - But some degree of power imbalance will be inevitable in most mediations and this doesn’t mean that mediation is necessarily inappropriate. Due to its increased accessibility compared to traditional litigation, mediation provides an avenue for assisted dispute resolution to people who might otherwise have none.
  - Mediators need to be sensitive to power imbalances, and be able to come up with strategies/procedures to help reduce these imbalances in the negotiations btwn the Ps

- **Enforcement of agreements to mediate**
  - A typical provision in an agreement, which states that should dispute arise, the matter will be referred to a mediator
  - *[Hooper Bailie Associated Ltd v Natcon Group Pty Ltd]* *(CB 106)*
    - Held that such agreement is enforceable provided that comply with the rules
    - i.e. Court should give effect to mediation agreement just like arbitration agreement
    - But important that there is reference to some objective standards

- **Good faith**
  - The idea of a truly voluntary process of mediation may be unrealistic — parties may experience pressure to enter into mediation e.g. as a result of court referral, or because of the inability to afford litigation
  - Can’t force the parties to act in good faith — e.g. Can’t force participation in mediation
  - Mediators need to have skills to resolve the problem but otherwise not much can be done if someone refuses to negotiate in good faith
  - Party may be penalized in some way in relation to costs if mediator submits a report as to the refusal to participate — but that would be inconsistent with the confidentiality principle, which is an important characteristic of mediation

- **Court annexed ADR**
  - In Vic, the *Supreme Court Act 1989* provides for the referral of civil matters to arbitration or mediation
  - The SC may refer whole/part of the civil proceeding with or without the Ps’ consent
  - Mediator may report, or be ordered to report, to the court as to whether the mediation is finished, but no other report shall be submitted to court
  - Normally referral will happen early in the proceedings
3. JURISDICTION

- Before a court proceeding can be instituted or an appeal brought, it is necessary to consider whether the court in which it is proposed to commence the proceeding or to launch the appeal has the necessary jurisdiction to determine it.
- Generally, 2 types of jurisdiction — subject matter vs territorial.

(i) Subject Matter Jurisdiction

- Refers to nature of disputes which may be adjudicated upon by a particular court.

Cth Judicial Power

- Ch 3 of the Cth Constitution sets out the constitutional framework through which courts are or may be invested with the judicial power of the Cth to enforce its laws.
- Under s71 of the Cth Constitution, Cth judicial power may only be exercised by:
  - (a) HCA
    - Original & appellate jurisdiction [CB p130-3]
    - Appellate jurisdiction under s73 Cth Constitution is limited by the Judiciary Act 1903 (Cth) — require the leave of the HC to bring an appeal from any interlocutory judgment.
  - (b) Federal courts created by the Cth Parliament
    - No cross-vested jurisdiction [Re Wakim] — forum shopping controlled through CV s5.
    - Original & appellate jurisdiction [CB p133-5]
    - + Accrued jurisdiction [CB p136]
      - A discretionary jurisdiction enabling FC to hear & determine claims that arise under the CL or state legislation (non-federal claims), if they are part of the same 'matter' as the claim within the FC's primary jurisdiction.
      - Cases e.g. [Fencott v Muller] make it clear that the fed & non-fed claims joined in a proceeding must both fall within the scope of 1 controversy, & hence within the ambit of the 1 'matter'.
        - [Fencott] — no precise formula, perhaps = dependence of the claims upon common substratum of facts; but [CB p139 ¶.2] definitely must exclude certain ones <¶.3>.
        - [Fencott v Muller] — see CB p138 ¶ 1 & 3 re: accrued jurisdiction.
  - (c) State & territory courts which are vested with federal jurisdiction
    - State Courts have federal jurisdiction conferred upon them by the Judiciary Act 1903 (Cth) — principal provision: s39.
    - e.g. Competition and Consumer Act 2010 (old TPA) — jurisdiction under that Act = jurisdiction that can be exercised by the state courts by virtue of the JA 1903.
State Courts - VIC

- Have subject matter jurisdiction in relation to common law & equitable claims
- Subject to the jurisdictional limits

| MAGISTRATES' COURT | Extent of jurisdiction: s100 Magistrates’ Court Act 1989
| | s 3(1): “jurisdictional limit” in a civil proceeding = $100,000
| COUNTY COURT | Extent of jurisdiction: s37 County Court Act 1958
| | Civil: incl. All claims for personal injuries & other personal actions — No jurisdictional monetary limit (plenary)
| | Criminal: All indictable offences except treason & murder
| SUPREME COURT | Unlimited i.e. Plenary jurisdiction
| | Will have subject matter jurisdiction in relation to the dispute that arises outside Vic, but may have problems re: territorial jurisdiction

- Victorian statutes may confer subject matter jurisdiction on the State courts
  - i.e. Statutory jurisdictions, which is also a subject matter jurisdiction
  - Conversely, statute may also modify / take away jurisdiction from the courts
  - e.g. Conferring the jurisdiction on VCAT

- + Federal jurisdiction conferred upon State Courts by the Judiciary Act

- Moreover, the Supreme Court has the jurisdiction of other superior courts through the Cross-Vesting Legislation
  - [David Syme & Co v Grey (1992) 38 FCR 303] — The Full Court of the Federal Court makes it clear the cross-vesting legislation is designed to vest subject matter

Cross-Vesting Legislation

- There is a clear division of subject matter jurisdiction between the Cth and the states
- This frequently resulted in litigation which had components belonging to the jurisdiction of different courts have to take place in more than 1 court. No court had jurisdiction to hear a whole dispute.
- Several hearings could be necessary — produced inefficiencies, uncertainties, unnecessary expense and delay

- In 1987, state and federal legislatures pass a number of Acts (principal provisions: s4), which collectively are referred to as the cross-vesting scheme.
  - = each of the superior courts in Australia could exercise each others’ subject matter jurisdiction.
  - Aim to ensure that, within the ambit of the scheme, a proceeding could not fail because of a lack of jurisdiction, but that jurisdictional balance would be maintained between courts through the appropriate exercise by the courts of the power to transfer proceedings.

- The scheme has 2 components:
  - The investment/conferral, as the case requires, of the original & appellate jurisdiction of each of the participating courts in or on each of the other participating courts
    - Participating courts = Federal Court, Family Court, Supreme Courts
    - Scheme doesn’t apply to HCA: [Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s3(1)]
  - A mechanism for transfer of proceedings to the best suited court
**Nature of Jurisdiction Cross-vested**

- [David Syme & Co v Grey (1992) 38 FCR 303] — The Full Court of the Federal Court makes it clear the cross-vesting legislation is designed to **vest subject matter jurisdiction** in the superior courts, **not territorial jurisdiction**
  - But the jurisdictional point discussed in this case is no longer important for interstate service, because of the effect of the *Service & Execution of Process Act 1992 (Cth)* in giving SCs of the state and territories Australia-edie territorial jurisdiction
  - **Only civil jurisdiction** is covered; jurisdiction with respect to criminal matters is expressly excluded
  - Doesn’t cover common law claims, **only statutory-based claims**
    - e.g. Right to claim relief under an Act enacted in Qld, s4 confer jurisdiction of Qld SC to Vic
    - If CL cause of action, hv jurisdiction, but subject to territorial jurisdiction & discretion etc

- An aspect of the scheme has been held to be constitutionally invalid
- In [*Re Wakim; Ex parte McNally (1999)*], HCA held that the cross-vesting **provisions which purported to confer state jurisdiction on federal courts were invalid.**
  - Held that s77(i) of the Constitution was an exhaustive statement of the jurisdiction which the Cth P could confer on a federal court
  - Further held that no entity other than the Cth P had power to confer jurisdiction on a federal court
  - Also, there was no power in the Cth P to authorize a federal court to exercise jurisdiction which the Cth P could not itself confer
- This case did not invalidate the entire scheme, but only those provisions which purported to confer state jurisdiction on federal courts.
  - e.g. s5 transfer still valid to control forum-shopping; s4 also survive to the extent that federal jurisdiction can be vested in state courts although not vice versa
- Also, the case concerns cross-vesting of state jurisdiction on a federal court. The conferring of territorial jurisdiction on a federal court was not in issue, and thus the decision does not invalidate s4 of the ACT & NT acts.

**Transfer of Proceedings**

- If the cross-vesting scheme merely conferred jurisdiction and contained no mechanisms to ensure that proceedings were brought in the most appropriate courts, it could have resulted in a significant change in the distribution of business among the courts and allowed parties to conduct proceedings in courts which were clearly inappropriate forums for the particular disputes.
  - Forum shopping = where a potential plaintiff looks around to find the jurisdiction in which he can get the most advantage

- To prevent forum shopping and to ensure jurisdictional balance between the various courts is maintained, the scheme contains provision for the transfer of proceedings in certain cases to a more appropriate court — [Key provisions: s5]
  - Requiring JJ to transfer a proceeding from 1 SC to another where it is **more appropriate and in the interest of justice** to do so

**N/B:** s5 applies to superior courts — for others e.g. county § magistrates courts, forum-shopping controlled through SEPA s20 (stay of proceedings)