WEN 7 JUNE Start writing 8:45; **Q1/2**: stop at 9:20, **Q3/4**: stop at 9:55; **Part B**: stops at 10:45

Overarching Considerations

Case management ➔ OAO; Solicitor's conduct rules

- Just ➔ **ADR; Offer of compromise**
- Efficient ➔ **ADR, Offer of compromise, Class action**
- Timely ➔ **ADR**
- Cost-effective

- Jurisdiction
- Limitation periods
- Cause of action
- Estoppels

Commence

- Writ with statement of claim
- CPA starts to apply
- Injunction or orders?

Serve

- Personal service
- Default judgment

Defence

- Strike out pleadings
- Summary judgment

Discovery

- Discoverable
- Privilege

Trial

Appeal

A non-party person to whom *CPA* applies might be asked to pay costs on the court's finding of contravention of OAO: *CPA 2010* s 29(1).

40. Other equitable doctrines exist helping discourage delay in bringing claims: the equitable doctrine of 'laches', which enables a court to decline granting a remedy where, due to the plaintiff's delay in bring an action, the defendant's or third parties' position had been detrimentally affected.[4]

Trevorrow v State of South Australia (No 5) (SASC, 2007)

41. The discretion to allow an extension of time should be exercised in favour of the plaintiff given that the wrongful actions of the state not only caused damages to the plaintiff, but also prevented him from bringing action.[5]
42. Where the equitable and legal claims before a court are of sufficient similarity and statutory limitations exist, the defence of laches will allow a corresponding bar on equitable remedies. However, it will be unjust to allow the equitable defence when the delay in bringing the action was also due to the conduct of the state.

Cause of Action ➔ Proper Basis Certification under *CPA* s 42

Identify the Parties ➔ Preliminary Discovery and Discovery from Non-Party

***SCR 2015* (Vic) rr 32.01-32.08**

43. Discovery to identify a defendant: s 32.03
    a) Applicant must have made reasonable enquiries;
    b) The court may order that the person attend before the court to be orally examined and make discovery to the applicant of all documents
44. Discovery from prospective defendant: s 32.05
    a) There is reasonable cause to believe that the applicant has or may have right to relief;
    b) Applicant must have made reasonable enquires;
    c) Applicant has not sufficient information to decide whether to commence a proceeding to obtain relief;
    d) There is reasonable cause to believe that the defendant has the document in his possession.
45. Discovery from non-party: s 32.07
    a) Applicable by any party to a proceeding;
    b) The person has or is likely to have in his possession any documents which relates to any question in the proceeding ⇔ subpoena: must identify which document is needed
46. Discovery to identify a defendant or discovery from non-party shall be made by originating motion supported by an affidavit: s 32.08(1)(4)
47. Party an applicant, or discovery from non-party shall be made by summons supported by an affidavit: ss 32.04, 32.06, 32.08(2)(4)

Federal Court Rules 2011 (Cth) r 7.22

Dallas Buyers Club LLC v iiNet Limited (FCA, 2015, Perram J)

[4] *Orr v Ford* (1989) 167 CLR 316.

[5] *Hawkins v Clayton* (1988) 164 CLR 539.

13. Costs implication ➔ examine whether the offer was unreasonably or imprudently rejected ➔ upon finding of unreasonableness or imprudence, the court will award costs against the offeree on an indemnity basis: *SCR 2015* (Vic) r 26.08 ➔ Test for reasonableness and prudence:
    a) Consider all the circumstances existing at the time of the offer ← the rejection of a reasonable offer is not necessarily unreasonable:
        i. There may be other issues in a particular matter more important than monetary compensation;
        ii. The offer may only be a tiny percentage better than the judgment → not enough to warrant departure from the ordinary costs rule;
        iii. The party's case at the time of the offer may have been fundamentally different to the case presented at trial;
        iv. The offeree may have had inadequate information to make an informed decision on the offer;
        v. There may have been unreasonable conditions attached to the offer;
        vi. The offer may have been left open for an insufficient amount of time, such that it may be deemed an unreasonable time for proper consideration of the offer.
    b) Assess whether the offer was genuine in the sense that it constitutes a 'real and genuine element of compromise' and 'compromise connotes that a party gives something away'.
14. The existence of a subsequent formal offer to settle will not serve to disqualify the *Calderbank* offer from consideration.[30]
15. Differences between *Calderbank* offers and formal offers to settle:

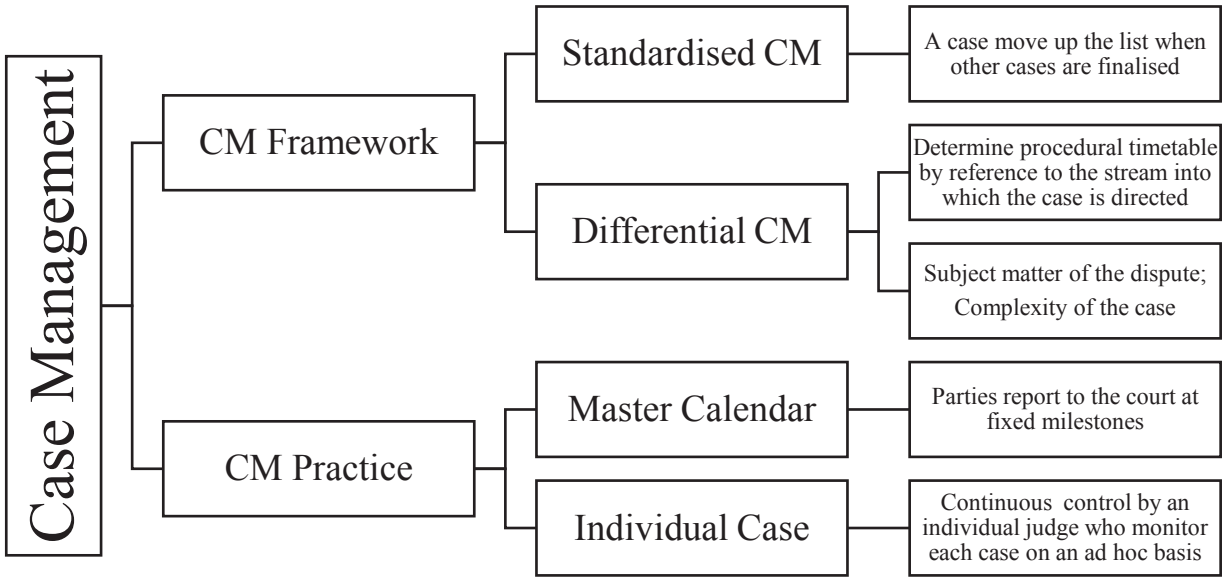
	Calderbank offers	Formal offers to settle
Weight	May be considered as a factor influencing discretion as to costs ➔ evaluate whether the rejection was reasonable at the time	Prima facie presumption for awarding costs against the offeree on an indemnity basis: *SCR 2015* (Vic) r 26.08
Onus of proof	Offeror to satisfy the court that it should exercise the costs discretion in its favour by proving the rejection was unreasonable or imprudent.[31]	Offeree to show that exceptional circumstances existed to depart from the general costs implications—the 'unless the court otherwise orders'.

Formal offers to settle / Offer of compromise: *SCR 2015* (Vic) rr 26.02-26.03.1

16. Must be made by serving written notice of the offer to the other party, and contain a statement to the effect that the offer is served in accordance with Order 26 of *SCR*: r 26.02(3).
17. Time:
    a) May be served at any time prior to verdict or judgment being given: r 26.03(1).
    b) Within the prescribed timeframe, a party can serve more than one offer of compromise: r 26.03(2).

[30] *Grbavac v Hart* [1997] 1 VR 154, 165 (Hayne JA).

[31] *Cth v Gretton* [2008] NSWCA 117, [46] (Beazley JA)



Aon Risk Services Ltd v ANU (2009, HCA): just resolution with minimum cost or delay

60. Expand justice to incorporate the interests of other litigant and the general public.
61. Narrow justice for the parties themselves so it does not demand an unfettered right to present the argument the parties desire, but rather grants then an opportunity to do so.

Expense Reduction v Armstrong Strategic (2013, HCA): inadvertent disclosure; SC's case management

62. NSWSC should have ordered that the respondents returned 13 privileged documents which had been in advertently disclosed to them by the appellants' solicitors during a court-ordered process of discovery.
63. *Aon v ANU* confirmed that the court's power of case management is not limited to amendment to pleadings, and is a correct approach to interlocutory proceedings which has regard to the wide objects of administration of justice.
64. It is important that a party making an inadvertent disclosure should act promptly, and relief of returning the privileged documents would be refused if it would be unfair to order so.

Yara Australia v Oswal (2013, VSC, Redlich, Priest, Macaulay JJA): overarching obligations

65. Judges are obliged to give effect to the overarching purpose of *CPA*, and can investigate on the court's own motions whether overarching obligations have been breached.

CPA 2010 (Vic) Pt 4.2: more extensive case management power than envisioned in *Aon v ANU*

66. Overarching purpose of case management (s 47(1)): in the interests of administration of justice, and public interest.
67. Active case management: s 47(3)
    a) Give directions to ensure prompt and efficient conduct of the civil proceeding;
    b) Identify at an early stage the issues involved:
        i. Order or direct parties to consult and prepare a statement of issues which identifies and summarises the key issues in dispute: s 50(1);

to be one which he had a real prospect of winning.

b) Court has the discretion to allow a case or an issue even when the test is not satisfied, when the court considers that there is a public interest in the matter being tried.

c) [22] Regime under *Federal Court Act 1976* (Cth) including but not limited to:

i. Pleadings disclose no reasonable cause of action and their deficiency is incurable;

ii. There is unanswerable or unanswered evidence of a fact fatal to the pleaded case and any case which might be propounded by permissible amendment.

iii. Cases that are frivolous or vexatious or an abuse of process.

71. [23]-[24] Relationship with striking out pleadings:[40]

a) Existence of a reasonable cause of action ⇔ Pleading of a reasonable cause of action.

b) Evidence may disclose that a person has or may have a 'reasonable cause of action' or 'reasonable prosects of success', yet the person's pleading does not disclose this.

c) Striking out pleadings does not empower the court to give judgment for the respondent against the applicant.

72. [25] Situations where there is no fanciful prospect of success:

a) There are factual issues capable of being disputed or in dispute;

b) The proceeding depends on proposition of law apparently precluded by existing authority, since the existing authority may be overruled, qualified or further explained ⇔ the proceeding is critically dependent upon a proposition of law which would contradict a binding decision of HCA.

73. [49] Interpretation of 'no reasonable prospect' of success:

a) [51], [57] Textual: essentially different from the UK regime of 'no real prospect'.

b) [52] Contextual: give effect to the negative admonition in sub-s (3).

c) [52]-[56] Signal departure from early authorities:[41] Whether there is a 'reasonable' prospect of prosecuting the proceeding, not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail.

[40] *White Industries Aust Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298, 309 [47].

[41] *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 91 (Dixon J); *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129-30 (Barwick CJ).