Conduct of Mediation

- Types of mediation:
  - Evaluative mediation;
    - Mediator facilitates discussion between parties but also evaluates the legal errors of each party's case and provide advice
  - Facilitative mediation;
    - Mediator takes a more hands-off approach, doesn't evaluate anything on the merits, and merely suggests things to the parties and initiates conversation
  - Transformative mediation.
    - Like facilitative, it is a party-driven process, but mediator tries to make the parties focus on their relationship as a whole — how can they convert the dispute into constructive relationship going forward
- ***Ethical Standards for Mediators (Law Council of Australia, 2011)***.
- ***National Mediator Accreditation System – Approval Standards and Practice Standards***.
  - Provides creditation and ongoing standard expectation of mediators — won't be recognised as an accredited mediator unless you sign up to this scheme
  - Need to comply with minimum training requirements and assessment
  - Mediators must comply with standards in AS and PS
  - ***S2.2 PS*** — mediation is a process that promote self-determination of the participants and mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes
    - Promotes the facilitative approach
  - ***S10.2 PS*** — mediator, with express consent of the parties, can adopt a 'blended' mediation process, which can involve some advisory and decisive functions
    - The principles of self-determination 'is emphasised again' — allow flexibility, but want the parties to remain an integral part of the process

Mediation Process

1. Opening statement by parties
   a. What is the purpose of the mediation, and why are they there?
   b. Parties express the issues they have identified
2. Mediator draws up a list of issues as identified by parties, identifies commonalities and key differences that have emerged
3. Parties explore the issues
4. If commonalties are found to exist, parties can make concessions on facts of dispute to settle, or otherwise they will continue to argue.

- If the parties wish to continue the negotiations, they can draft a heads of agreement on the day so that they can agree to something, the particulars of which can be finalised subsequent to the mediation.
- This heads of agreement indicates a clear intention to be immediately bound, even if the final settlement has yet to occur. Otherwise, there may not be any agreement.
- In ***Max Reflectance Investment Pty Ltd v Drazcat Pty Ltd*** [2009] QSC 24, the court held that, without more, the fact that the parties enter into a heads of agreement 'subject to a formal deed' may indicate that the parties do not intend to be immediately bound.
- In both the heads of agreement and the finalised agreement, how the terms of the settlement will be disposed of must be addressed. This creates something on the record that can be used in estoppel so the proceedings can be estopped at later stage.
- Parties can provide that a notice of discontinuance will be filed in the court: ***Kinch v Walcott*** [1929] AC 483.
  - If you simply have proceedings by filing a notice of discontinuance, this does not permit a cause of action in estoppel

- Parties have a fall back mechanism — provide for mutual releases and indemnities
- If there is an attempt to bring proceedings, the fall back is to gain some form of specific performance

Lawyer's Role in Mediation

- There are five models of lawyers acting in mediation: ***Samantha Hardy and Olivia Rundle, Mediation for Lawyers*** (CCH, 2010) **143-154**
  1. Absent advisor lawyer — lawyer helps client prepare for mediation, but does not attend – common in practice as it takes attention away from having lawyers involved
     - QCAT — lawyers can only appear with leave from QCAT
  2. Advisor-observer — can attend the mediation and help them create the agreements, but cannot make comments at the mediation
  3. Expert-contributor — will speak up at mediation, offer opinion on legal merits of the parties
  4. Supportive-professional participant — both the lawyer and the client drive the settlement process — not only providing legal opinion as a lawyer, but also assists with the commercial side
  5. Spokesperson lawyer — client has very limited role, and the lawyer drives all negotiations

Ethical Responsibilities During Mediation

- ***Australian Solicitors' Conduct Rules, r7.2***.
  - Solicitors have an ethical duty to advise clients of the possibility of ADR processes being used
  - Solicitors must inform the client of alternatives to adjudication that are available to the client, unless the client already has an acceptable understanding of those alternatives
  - While mediation is in process, there are no specific rules under ASCR, but some generic rules under ***Guidelines for Lawyers in Mediations*** (Law Council of Australia, 2011) - these are guidelines, and are not binding on lawyers
- ***Studer v Boettcher*** [2000] NSWCA 263.
  - [75] - as a lawyer, you must always act in good faith in the best interests of the client - general fiduciary duty under equity - can never overbear the will of the client - final decision must always be the client's
- ***Legal Services Commissioner v Mullins*** **[2006] LPT 012.**
  - If the other party in dispute relies on particular information that has been provided by your client, and if circumstances change and you fail to correct any apprehension the other party is under, you are positively misleading the other party and can face consequences as a lawyer - professional misconduct which could lead to striking off if sufficiently serious

TRIAL

- Trials started by application are allocated a hearing date upon filing the originating process, but trials started by claim need to have their trial dates fixed by the parties.
- UCPR rr467-9

467 Request for trial date

- Show that you have a matter that is contentious - show the court you are ready for trial
  - If a party thinks it is ready for trial, it serves a notice to go to trial to the other party
- ***UCPR Form 48***
  - Form signed by other party if it thinks it is ready for trial
- (4) meaning of 'ready for trial'
  - Disclosure completed
  - Orders requiring further particulars completed
  - Interrogatories have been answered

- Witnesses available
- All necessary steps in the procedure are complete

468 Trial expedited

- Expert at trial - court has broad discretion as to whether it will order an expert to appear
- The court set out the factors it will consider for whether experts will appear in ***Greetings Oxford Koala Hotel Pty Ltd v Oxford Square Investments Pty Ltd (1989) 18 NSWLR 33, [42] - [43]***:
  - Applicant's prospect of success
  - Availability of witnesses
  - Any need to preserve subject matter
  - Any hardship involved
  - Conduct of parties

469 Dispensing with signature on request for trial date

- It is possible to dispense the signature of the other party if they haven't signed within 21 days.
- Court will only dispense if there is no genuine reason for that party to have not signed the agreement for a trial date.

Jury Trial

- ***UCPR r472*** allows for either the plaintiff or defendant to request for a jury trial, unless a jury is excluded by a relevant statute.
  - ***S73 Civil Liability Act 2003 (Qld)*** restricts juries for personal injury claims;
  - ***S4 Magistrates Court Act 1921 (Qld)*** restricts juries for Magistrate Court proceedings, as they are all summary by nature.

Attendance at trial

- ***UCPR r476*** provides that the defendant does not need to appear at trial, but would be advised to do so. If they do not attend, the plaintiff can present its case without rebuttal, and the court is likely to make an order in their favour.

Decisions without an oral hearing

- It is possible for interlocutory applications to be determined without an oral hearing.
- UCPR rr487-498

487 Definition for Pt 6

488 Application of Pt 6

489 Proposal for Decision Without Oral Hearing

- Hearing on the papers = judge makes the decision based on the documents that are submitted to the judge's associate beforehand
  - For these hearings on the papers, the plaintiff (and possibly the defendant) must prepare a 'trial bundle' containing all documents they intend to rely on during the trial. These must be served on the other side in advance of the hearing.
  - The bundle must contain, at minimum:
    - Outlines of submissions that you hand to the judge
    - Draft order must be handed up to the judge
    - Anything else required by the relevant practice directions, e.g. ***2012/11 Supervised Case List***.
- No formal hearing