

**TOPIC 9: SETTLEMENT, ADR AND  
OFFERS OF COMPROMISE:**

## **9. SETTLEMENT:**

Settlement = terminated prior to trial by agreement.

### **STEP 1) Formalizing agreement:**

#### **9.1 Formalizing settlement agreements:**

While settlements are contracts and can be enforced as such, it is obviously more satisfactory if they can be enforced as judgments in the original proceeding.

There are various ways to formalise settlement agreements in Victoria:

1. **Consent Judgment**
  - a) Terms of settlement included but execution stayed as long as the D complies
  - b) Terms of settlement impose obligations on all parties.
2. **Adjournment of proceedings**
  - a) Option to reopen in the event of a breach of the compromise agreement.
3. **Discontinue proceedings on the basis of a contractual terms of settlement**
  - a) In the event of a breach, the parties resort to their contractual remedies.
4. **Court can dismiss with a right of reinstatement**

- Court may order a proceeding to be referred to a mediator, even if a party does not agree: r 50.07(1)
  - If so, mediator shall attempt to achieve settlement: r 50.07(3);
  - A mediator must report to the court that ordered the mediation, that its finished but need not report anything else rr 50.07(4) and (5) – TL;DR: what was discussed the mediation is kept from the judge
- Under s 66 of the *CPA* the Court is authorised to order a judicial resolution conference which includes judicial mediation.
- A matter may be referred by the Court to judicial mediation at any stage in the proceeding under Order 50
- Judicial mediation is conducted by a Judicial officer – eg a Judge of the Court, Associate Judge, or Judicial Registrar

### Judicial Mediation:

- Judicial mediation will usually be used when:
  - an earlier private mediation was unsuccessful;
  - one or more parties has limited resources;
  - There is a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute;
  - The estimated trial length would [disproportionately] occupy substantial judicial and other court resources; or
  - It is in the interests of justice that the matter be referred to judicial mediation.

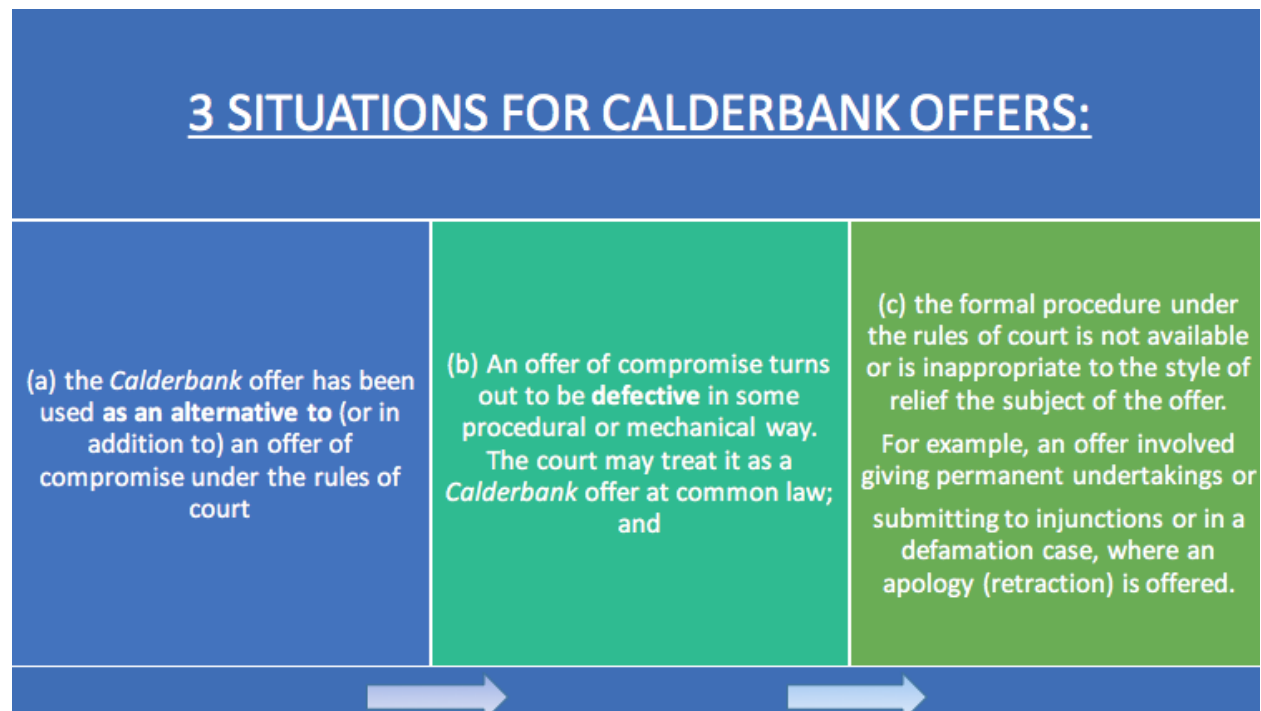
### Confidentiality:

- Everyone has an obligation to protect confidentiality
- s 131 of the *Evidence Act 2008* - Exclusion of evidence of settlement negotiations and
- Also see s 67 of *CPA* – exclusion of evidence
- The mediator will not disclose the contents of any notes or prepared docs for the mediation once it is done.

– *Pirotta v Citibank Ltd* (1998) 72 SASR 259 CB: 16.3.50C – (Victorian authority: *Grbavac v Hart* [1997] 1 VR 154)

\*\*If the outcome is no more favorable than the offer then the court will normally order costs incurred after the rejection or non-acceptance of the offer against the offeree.

\*\*Costs ordered can be indemnity costs: *R v Murfett*.



### **9.18 Criteria:**

1. The letter containing the offer should be clearly marked “without prejudice save as to costs” or words to that effect
2. The letter must state the time period which the offer will remain open
3. The offer contained in the letter must be as clear and precise as reasonably practicable so as to indicate the exact nature of the offer.
4. Usually *Calderbank* offers are all-in offers (ie. Including costs)

**TOPIC 10: TRIAL & JUDGEMENTS**  
**+ COSTS AFTER TRIAL:**

## **10.1 Trial by jury:**

In so far there is a presumptive right to jury trial in **CONTRACT & TORT** cases, it is also conditioned on a party electing for trial by jury in accordance with the rules: Vic R 47.02(1). In attaining a trial by jury, two conditions must be satisfied:

**NOTE:** any presumption can be rebutted, can rebut to judge.



### **1. A party opts for jury trial: r 47.02(1)(a).**

- In Victoria the rules require that the Plaintiffs elect in their originating process (ie writ) and defendants within 10 days of their giving notice to the plaintiff and the registrar within 10 days of appearance.
- Failure to comply with these limits does not preclude jury trial, but the party seeking a jury trial bears the onus of making a case for it.

AND

### **2. The proper jury fees are paid r 47.02(1)(b).**

- If jury fees are not paid in accordance with **r 47.03** then the court may order that the proceeding continue without a jury **r 47.03(3)**
- Failure to pay in time forces the court to discharge the jury and continue to hear and determine the case without a jury.

• **Juries Act 2000 (Vic) s 24(5)**

## **STEP 3) ONUS OF DISPENSING THE JURY**

### **10.2 Dispensing with the jury:**

Court may direct trial without jury if in its opinion the proceeding should not in all the circumstances be tried before a jury: **r 47.02(3)**.

	<p>– questions of law are often difficult to separate from questions of fact</p> <p>– questions of liability are likely to involve at least some of the same questions as the level of damages.</p>
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**Test:** Courts to be guided by the pleadings and its provisional assessment of the merits of each parties' cases

**APPLY TO FACTS**

**CONCLUDE**

**STEP 1) EFFECT OF FAILURE TO ATTEND:**

*What are \_\_\_ options as a result of his/her failure to attend?*

## **10.11 FAILURE TO ATTEND:**

If a party is absent from the trial, the court has several options:

1. It can stop the trial (the case must be set down for trial again), or order certain steps to be taken: **r 49.02(1)(a)**
2. It can allow the trial to continue generally: **r 49.02(1)(b)**
3. It can adjourn the trial on such terms as it sees fit: **rr 49.02(1)(c), 49.03**

**If the court proceeds with the trial:**

If the D failed to attend:

The plaintiff must still prove its case. If it can't, it loses: ***MY Distributors P/L v Omaq P/L (1992)***

If the P failed to attend:

it can't prove its case: ***Armour v Bate (1891)***

★ Any judgment given in the absence of a party may be set aside: **r 49.02(2)**.

## APPLY TO FACTS

## CONCLUDE

### STEP 1) NO CASE SUBMISSION

Can \_\_\_ make a no case submission?

## **10.12 NO CASE SUBMISSION:**

Background info:



To understand no case submissions you must first understand the order of evidence and addresses – 0 49

General structure of a trial:

1. P opens with an opening address - their story/narrative
2. P Calls evidence – Cross Examined by D
3. When P is finished with its evidence it closes its case
4. D opens its case and calls evidence – cross examined XXN'd by P
5. Closing addresses with P closing last

At the end of the P's case, the D may make seek leave to make a “no case” submission:

– On the basis of the evidence presented by the P, a reasonable finder of fact could not find in the P's favour.



<b>IF SUCCESSFUL</b>	<b>IF NOT SUCCESSFUL</b>
If the submission is successful the defendant wins.	Court can still find that the P didn't fully make out its case on the <b>balance of probabilities</b>



# **TOPIC 11: APPEALS**

## STEP 1) APPEALS PROCESS:

### **11. APPEALS: R 64.01(1)**

Appeal is 'the formal procedure by which an unsuccessful party seeks to have the formal order of a court set aside, reversed or varied in [their] favour by an appellate court'; **Commonwealth of Australia v Bank of New South Wales (1949)**

**R 64.01(1):**

- (1) ...*appeal* includes—
- (a) an application for a new trial;
  - (b) an application to set aside or vary a decision;
  - (c) an appeal by way of rehearing of judicial review;
  - (d) a cross-appeal—

**Types of appeals:**

STRICT APPEALS	REHEARINGS	APPEALS DE NOVO
Judge made an error of law, or a finding of fact	Most common in Supreme Court	A full retrial before the appellate court.
The court will look only to answering that particular question	The court tries the case again on the initial evidence	All questions of fact and law must be tried again.
the appeal court will substitute its own judgment	• Can add any additional evidence it thinks fit to receive	Entirely new proceeding.
	Based largely on the transcript of evidence from the original court	
	There is no presumption in favour of the validity of	

<p><b><u>INTERIM INJUNCTIONS:</u></b> will be expressed in either:</p>			<p><b><u>PRESERVATION ORDERS:</u></b> The court possesses specific powers to: - Preserve property (may also be evidence), Or - To ensure the benefits of property are preserved in the event they are needed to satisfy a judgement.</p>		
<p><b><u>MANDATORY TERMS:</u></b> Orders that some position action be carried out.</p> <p>OR</p> <p><b><u>PROHIBITORY TERMS:</u></b> Order to refrain from doing something.</p>			<p><b><u>SEARCH ORDERS/ANTON PILLAR O37B</u></b>  Most jurisdictions have adopted harmonized rules and practice directions for search orders based on principle established at common law: O37B.</p>	<p><b><u>INSPECTION, DETENTION AND PRESERVATION OF PROPERTY ORDERS O37</u></b>  **Not talking about documents – this would be discovery.</p>	<p><b><u>MAREVA FREEZING ORDERS O37A</u></b>  A mareva order is limited to preventing a defendant from disposing of assets or removing them, so as to defeat any judgement that the plaintiff may obtain against the defendant at trial: Barclay-Johnson v Yuill.</p>
<p><b><u>BEFORE PROCEEDINGS ARE ISSUED: INTERIM INJUNCTIONS:</u></b>  Interim injunctions can be ordered before the commencement of proceedings: R 38.01.  In the circumstances provided by: R 4.08:  1. In an urgent case,  2. The court may, on</p>	<p><b><u>AFTER THE PROCEEDINGS ARE ISSUED: EX-PARTE INJUNCTIONS</u></b>  Ex-Parte injunctions are rarely sought, except where there is a reason to believe that, if put on notice, respondent may act so as to defeat the purpose of the injunction before it can be issued.  An application may be</p>	<p><b><u>AFTER COMMENCEMENT OF PROCEEDINGS: INJUNCTIONS WITH NOTICE:</u></b>  Application made: - Via O46 summons - With affidavit and - Notice to the respondent  Success will depend upon balancing</p>	<p><b><u>Purpose:</u></b> securing or preserving evidence and requiring a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence which is, or may be, relevant to an issue in the proceeding or anticipated proceeding.  <b><u>Timing:</u></b> before or after proceedings</p>	<p><b><u>Purpose:</u></b> Inspection, detention, custody or preservation of any property, whether or not it is in the possession, custody or power of a party: r 37.01 and to assist a prospective P to determine whether there is a cause of action against a prospective D: r 37.02  Cannot be used to prevent parties from dissipating assets. See</p>	<p><b><u>Purpose:</u></b> Preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly unsatisfied r37A.02(1).  <b><u>Timing:</u></b> Before or after proceedings issued</p>