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TIME PLAN

Q1: 25 Marks – **30 mins (2:00 – 2:30)**
Q2: 30 Marks – **36 mins (2:30 – 3:06)**
Q3: 20 Marks – **24 mins (3:06 – 3:30)**
Q4: 25 Marks – **30 mins (3:30 – 4:00)**

Introduction to Litigation (incl. case management)

Why do we have procedural law?	A fundamental difference exists between procedural law and substantive law. Procedural law governs and regulates 'the mode or conduct of court proceedings' (McKain). Comparably, substantive law is concerned about establishing or defining a right. In NSW, procedural law is provided by the CPA, UCPR, jurisdictional legislation (ie. Supreme Court Act), practice notes of a particular court and the Evidence Act. **Importance of procedural law** Procedural law is important for a number of reasons and attempts to achieve a balance between the below factors. First, it …. **[SEE FULL ARGUMENTS IN NOTES]**
Overriding purpose and Case management principles	Case management has become a defining feature of the NSW civil Court system since the introduction of court management rules in the **Civil Procedure Act 2005 (NSW)**. It replaces the previous system where case management was simply left to the parties themselves to organise when preparing for a trial. The primary purpose for introducing a mandatory level of case management into the NSW civil procedure system was ……**[SEE FULL ARGUMENTS IN NOTES]** There are a number of reasons advanced for introducing a minimum level of case management into the CPA. **(1) Delays** First, case management reduces delay which in turns improves access to justice. Appropriate case management has the potential to ensure that issues can be avoided with witnesses and evidence. It can also positively reduce court backlog. Prior to caser management, delay had become a cultural norm in NSW. Justice Spigelman (2001) accentuated that it often took years to get a case to trial. Nonetheless, following the introduction of case management principles, there has been a substantial reduction in court delays. Indeed, Spigelman (in 2009) articulated that there is now no reason why a case cannot be disposed of to final hearing within twelve months in the District Court and two years in the Supreme Court. This evidences the positives effects of the introduction of case management principles to the NSW litigation system. **(2) Costs** Second, case management has the potential to reduce costs for parties. It can reduce the issue of cost being used as a tactical weapon by well-resourced parties or corporations to force under an under-resourced part to discontinue proceedings or accept a settlement. Case management discourages this from happening, since it is under the management of the court.

	However, in direct opposition is the view that there ……**[SEE FULL ARGUMENTS IN NOTES]**
Overriding purpose	**[SEE FULL ARGUMENTS IN NOTES]**
Practical Effect of CPA and UCPR ("overriding purpose" provisions)	The rules in **s 56** have arguably had an overwhelming positive impact on case management in NSW. The practical effects can be evidenced in the reasoning of a number of cases in relation to the overriding purpose. First, following the decision in **Queensland v JL Holdings**, it is now understood that **s 56(2)** acts as a statutory duty on Courts to give effect to …..**[SEE FULL ARGUMENTS IN NOTES]** Second, case law confirms that it is the court and judges (rather than litigants) who play the important role of reducing issues associated with case management. For instance, in **Halpin v Lumley-General insurance**, it was confirmed that the Court has …..**[SEE FULL ARGUMENTS IN NOTES]** Finally, whilst a 'just resolution of proceedings' remains the paramount purpose, the nature of a just resolution is to be understood in light of the purposes and objective stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings (**AON Risk Services**). Ultimately, this achieves the fundamental aim of case management, which is to minimise delays in the adversarial context.

Court v ADR

Is ADR suitable? Or should litigants rely on the traditional court system.

Introduction	The adversarial system (ie. traditional court setting) has historically been the primary means and method of resolving civil disputes between parties. Indeed, the Court was regarded as the only legitimate way that parties could adequately receive justice. However, with recent emphasis in NSW regarding case management and the just resolution of disputes according to the law (**CPA s 56**), and along with general criticisms of the Court that it involves a lengthy and costly process, ADR (or alternative dispute resolution) as emerged as a compelling and appropriate alternative. This is because it is generally seen as a quick, inexpensive and efficient means of resolving disputes. This essay will analyse the role of both courts and the ADR processes (and their roles in achieving the 'just, quick and cheap' resolution of issues).
Broad comparison	First, it is necessary to understand the fundamental differences that exist between the traditional Court setting and ADR processes. These differences often guide a litigant in determining how he/she will solve a dispute. Generally, a Court is governed by a judge, who determines 'controversies' through application of the law, and exercises his powers in a public and institutional setting. The powers of a judge are strictly limited to publicly determined jurisdictional boundaries and judicial determinations are made according to the law, which then have a precedential effect. Court processes are non-consensual and the outcome is binding and enforceable. On the other hand, these unique judicial functions are not ….**[SEE FULL ARGUMENTS IN NOTES]**
Continuing role for Litigation (Legg & Mirzabegian)	There a number of reasons why a litigant may seek to rely on the traditional Court system, rather than alternative dispute resolution mechanisms. **Positives** Litigation is useful when what is sought to be enforced is a **right, constitutional issue or governmental regulation** issue. These may include issues **which impact the wider public** or where there is a **need for deterrence** through court findings, publicity or court sanctioned remedies. [**For example, cases concerning criminal law, intellectual property, securities transactions and insolvency are all legal areas which may impact the wider public. Arguably, this means that the resolution of these disputes outside a national court system inappropriate**].

	… **[SEE FULL ARGUMENTS IN NOTES]** Litigation can also **compel the disclosure of information**, through preliminary discovery, actual discovery and subpoenas. This is crucial to level the playing field, particularly when information is in the sole possession of one party). **It may also assist in efficient resolution of the dispute, help parties identify issues and provides for the ascertainment of the truth, which is key to proper administration of justice.** On the other hand, in ADR, whilst ….**[SEE FULL ARGUMENTS IN NOTES]** Finally, there are significant **procedural protections** in litigation, which have the effect of equalising any power imbalances which may ensue in a trial (ie. family, domestic violence or employment cases). Subjecting parties to procedural requirements, as well as the fact that there is an impartial adjudicator, reasoned decision, open justice, notice, opportunity to be heard and a case based on evidence and argument helps ensure justice.
ADR	**Positives** There are a number of advantages of alternative dispute resolution. First, it can allow better access to justice in comparison to the traditional court system. ADR is typically more affordable to people with limited money since there are significant savings on court costs, lawyers' fees and expert fees. It can also result in …..**[SEE FULL ARGUMENTS IN NOTES]** **Negatives** Chief Justice Bathurst argues that forcing parties to use ADR will undermine the legal system's goals of justice and fairness. He supports this proposition with a number of arguments. a) First, compulsory mediation may paradoxically result in courts being burdened by satellite litigation in which the **courts begin to be used to ……[SEE FULL ARGUMENTS IN NOTES]** b) Second, compulsory mediation may raise issues as to how a court is to determine whether an attempt to resolve a matter (ie. taking "genuine steps" to resolve a dispute before litigation) has been …..**[SEE FULL ARGUMENTS IN NOTES]** c) Furthermore, if mediation is made compulsory, it ….**[SEE FULL ARGUMENTS IN NOTES]** **[SEE FULL ARGUMENTS IN NOTES]**

Intersection between ADR and Courts	**[SEE FULL ARGUMENTS IN NOTES]**

Court-ordered mediation

Introduction	Court-ordered mediation (or compulsory mediation) refers to the power of the court to refer matters to mediation without the consent of parties. The power of the court to refer proceedings to mediation is contained in **s 26** of the CPA ("the court may, by order, refer any proceedings" to mediation). Whilst the development court-ordered mediation has certainly increased the use of mediation within the court system, it has also raised desirability issues regarding efficacy, particularly when it is ordered against a party's wishes. There are many benefits to court-ordered mediation. It not only provides parties with a further opportunity to resolve their dispute amicably but it also ensures that scarce and publically funded judicial resources are used only in determining intractable disputes. Arguably, these potential benefits justify the continued use of court ordered ADR.
Discretion (Higgins v Higgins)	Perhaps, the most striking feature of court-ordered mediation is that the court's discretion under **s 26 of the CPA** is very wide. The only thing which truly bars the wide discretion afforded is if the court believes mediation has no plausible prospects of success. This issue was explored in **Higgins v Higgins**, which involved a 76-year-old plaintiff suing her son and daughter in law over a land dispute. The plaintiff asked the court to refer maters to mediation, despite the defendant opposing mediation. The court held that the fact that the plaintiff was old and infirm, wished to repair her relationship as well as conclude the matter quickly, were persuasive considerations in favour of mediation. Furthermore, the court took into account that there was an available time and a pro-bono mediator, and that the mediation was likely to be quick. On balance, Austin J held that the proper way to exercise his judicial discretion in the circumstances was to order mediation. The court also held that even if a party opposes mediation (such as in this case), this does not mean that mediation is likely to be pointless. Rather, the court overturned a previous line of reasoning (**Morrow v chinadotcm**), finding that instead, what often happens is that when a reluctant party accepts mediation, they will cooperate well and realise that they can benefit from the process.
Duty to act in good faith	**[SEE FULL ARGUMENTS IN NOTES]** **Positives** **[SEE FULL ARGUMENTS IN NOTES]**

	Negatives Nonetheless, in the context of mediation, there are complex problems in terms of regulating the duty to act in good faith, or more broadly, enforce or otherwise scrutinise the outcomes of mediation. One of the fundamental aspects of mediation, and its potential desirability for parties, is that proceedings are inherently confidential. However, in order for a party to prove, for example, that a party …..**[SEE FULL ARGUMENTS IN NOTES]**

Enforceability of ADR clause

Introduction	**The fact that ADR clauses are practically futile provides another reason suggesting that alternative dispute resolution is meaningless.** A contract may contain a 'dispute resolution clause', which entails a party to solve a dispute by first trying ADR. There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration (**Commercial Arbitration Act 2010**). Nonetheless, if the parties have entered into an agreement, it is possible that the Court may, as a precondition to commencement of proceedings in the dispute, make orders that achieve the enforcement of the agreement (**Hooper Baile v Natcan Group**). When construing dispute resolution clauses, the court will adopt a liberal approach to contractual construction (**Lipman v Emergency Services**), with the ultimate issue usually being whether an agreement to negotiate in good faith is enforceable or void for uncertainty. The enforceability of an ADR clause was explored in **United Group Rail Services v Rail Corporation**. The parties had a contract

Arbitration

<table>
<tr><td>Introduction</td><td>[SEE FULL ARGUMENTS IN NOTES]</td></tr>
<tr><td>Compulsory arbitration</td><td>
Court-annexed arbitration is within Part 5 of the CPA.
<table>
<tr><td>CPA s 38</td><td>The court may order proceedings be referred for determination by an arbitrator</td></tr>
<tr><td>UCPR r 20.8</td><td>provides that proceedings involving allegations of fraud and proceedings in the small claims division of the local court cannot be referred</td></tr>
<tr><td>CPA s 37</td><td>The jurisdiction conferred on the mediator is part of the jurisdiction of the court</td></tr>
<tr><td>CPA ss 49, 51</td><td>The arbitrator determines the procedure of the arbitration but the rules of evidence apply</td></tr>
<tr><td>CPA ss 50, 52 and 53</td><td>The arbitrator does not have the power to compel witnesses, issue subpoenas or punish for contempt. If conduct gives rise to these issues in arbitration is must be referred back to the court</td></tr>
<tr><td>CPS s 39</td><td>The award records the determination and the reasons in writing and it is signed</td></tr>
<tr><td>CPA s 40</td><td>The award is sent to the referring court and if it is not subject of a rehearing then the award is final and conclusive and is taken to be a judgment of the referring court</td></tr>
<tr><td>CPA ss 42-27; UCPR r 20.12</td><td>A dissatisfied party can apply for a rehearing to take place before a judge (CPA ss 42-27). An application for rehearing under s 42 is to be made by notice of motion UCPR r 20.12.</td></tr>
<tr><td></td><td>In all but the limited circumstances set out in CPA s 43 the court is required to order a full or limited rehearing once the application has been filed in time. Oral evidence given in the arbitration will not be admissible and documentary evidence must be re-tendered.</td></tr>
<tr><td>CPA s 46</td><td>The court may make a costs order in respect of both the arbitration and the rehearing (). The court may order costs against a party who makes a tactical decision to not call available evidence at the arbitration that is then called at a rehearing (Sydney City Council v Geftlick [2006]).</td></tr>
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Litigation Funding

Related essay questions	Discuss the intersection of the practice of law (with a focus on justice) and the business of law (with a focus on commerce) and how prioritising one or the other can impact the decision about how to resolve a dispute and the conduct of that process.
What is it?	Litigation funding refers to the situation where a commercial entity (the 'funder') enters into an agreement with one or more litigants to **pay the costs of litigation**. The funder will accept the risk of paying the other party's cost in the event that the claim fails and will provide the plaintiff with indemnity. If successful however, the funder will receive a certain percentage of any funds (typically 1/3 to 1/2) recovered by the litigants by way of settlement and may also assign the funder the benefits of any costs they receive. In this sense, the funder must calculate the risk associated with the litigation (or their prospects of success) and then quantify the amount of a successful recovery and potential liability. ….**[SEE FULL ARGUMENTS IN NOTES]**
Abuse of process	…. **[SEE FULL ARGUMENTS IN NOTES]**
Access to justice	In Fostif, Kirby J recognised the importance of access to justice as a fundamental human right. Litigation funding arguably increases access to justice. It provides funding for meritorious claims (Fostif). In the context of funding class actions, this means that a large number of people can be helped. Furthermore, the funding of pro bono and legal aid clinics means that ….**[SEE FULL ARGUMENTS IN NOTES]** Nonetheless, this argument is countered by the fact that litigation funders are selective in who are chosen. Marginal cases are often not selected for litigation funding, nor cases whereby the assessment of damages may be low. There is great potential that …**[SEE FULL ARGUMENTS IN NOTES]**
Conclusion	**[SEE FULL ARGUMENTS IN NOTES]**
Case example	Campbells Cash & Carry v Fostif is a relatively recent case which discussed the issue of litigation funding. In that case, the plaintiff brought a claim for recovery of amounts paid by tobacco retailers to the wholesalers. The plaintiffs claim was funded by a litigation funder who underwrote litigation in exchange for one-third

	of ay amounts recovered plus benefit of any costs order. The defendant sought an order to stay proceedings on the basis that the funding was an abuse of process and contrary to public policy. The court held that there is no general law or public policy against litigation funding. It also recognised that there are two potential fears associated with litigation funding, those being: a) adverse effects on the processes of litigation; and b) fears about the "fairness" of the bargain struck between the funder and intended litigant. ….. **[SEE FULL ARGUMENTS IN NOTES]**

Class Actions / representative proceedings

What is it?	There have been substantial changes in the class action landscape in Australia following the introduction of Australia's federal class action regime in 1992. Indeed, the number of class actions have increased substantially (particularly shareholder class actions), whilst the doctrines and principles of class actions have developed in close parallel with the rise of third party litigation funding in ……**[SEE FULL ARGUMENTS IN NOTES]** This essay will explore both the benefits and weaknesses of the class action model, with reference to **Part 10 of the Civil Procedure Act**. It will argue that whilst there are many advantages of the model, the …..**[SEE FULL ARGUMENTS IN NOTES]**
The law	**[SEE FULL ARGUMENTS IN NOTES]**
Arguments FOR and AGAINST Class Actions (Giles v Cth)	There are a number of arguments raised in favour of class actions. **Arguments for** In **Giles v Commonwealth of Australia**, the court …… , **[SEE FULL ARGUMENTS IN NOTES]** **Arguments against** Nonetheless, there are a number of disadvantages with class actions, which typically concern the economics of litigation. First, class actions are typically hard fought and therefore very expensive. It is therefore almost never viable to run a class action without seeking monetary relief. Since a class action needs to be ……**[SEE FULL ARGUMENTS IN NOTES]**

Online dispute resolution and technology

Broad introduction on the uses of technology in a dispute context	**[SEE FULL ARGUMENTS IN NOTES]**
Online Dispute Resolution (ODR)	ODR is broadly defined as 'dispute resolution outside the courts, based on information and communications technology'. The key driver of ODR in recent years has been the need for **affordable access to justice**. Indeed, Legg (2016) argues that in the context of low-value disputes, there often circumstances where what is at stake is worth a lot less than the cost, time and effort of having to commence formal legal proceedings, or even in seeking legal advice. ODR attempts to tackle this problem. **[SEE FULL ARGUMENTS IN NOTES]**
Electronic discovery	The importance of technology in discovery cannot be underestimated, particularly with the sheer volume of electronically stored information ('ESI') that now exists. **Cloud computing** The recent shift towards cloud computing has implications on electronic discovery. This is because the entities who store the files on them are no longer the custodians of the records they produce or receive, which can raise novel issues in litigation as to who is obligated to comply with court sanctioned requests for documents. For instance, an issue may be whether the cloud service provider is under an obligation to comply with Court orders.