INTRODUCTORY CONCEPTS:

Definition of Civil Litigation: A judicial or administrative process in which the parties (or their lawyers) present their case in a formal, adversarial public proceeding to a judicial official who makes a decision according to substantive legal rules. The decision is reviewable by a higher court for errors of law, and after final review, is binding on all the parties and has precedential effect

Interlocutory Proceedings: This course is concerned with interlocutory proceedings only. Interlocutory proceedings are those 'normally related to matters of practice and procedure, in which the substantive rights of the parties to the matter are not finally determined' - *Butterworths Australian Legal Dictionary*

Procedural Law: 'The branch of law which creates, defines, and regulates people's rights, duties, powers and liabilities: the actual rules and principles administered by the courts, including legislative and common law principles. Substantive law includes most branches of law, such as the law of torts and contract law" - Butterworths

- 'the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right' – *Payers v Minors* [1.2.1 Casebook]
- *Bentham* – procedural rules are 'adjectival' in the sense that they qualify substantive law

Historical Principles Underpinning Procedural Law:

- Pragmatism – there has been a recent shift away from pure adversarialism
- Judge as umpire ethos – the sporting theory of justice espoused by *Roscoe Pound*
- Originally all disputes were reduced to a form of action, however, the rigidity of this approach led to *Judicature Act* (JA) reforms
- The policy underpinning the JA reforms was that cases should not fail on a technicality and parties should not be surprised at trial
- Party control of litigation prospered until the 1980s and no change in the role of judge (as umpire) until delays in civil litigation led to the development of case management by judges and overriding objectives to guide rule making

Terminology:

- *Suit* - includes any action or original proceeding between parties of a civil nature – Supreme Court Act
- *Cause* – generally two parties and concerns question(s) of fact
- *Matter* – generally concerns a question of law and no opposing party
- *Cause of Action* – facts which give rise to an enforceable claim
- *Originating Process* – method for commencing proceedings. Either originating claim or originating application - r31(1)
- *Motion* - Now called 'application', defined r 6006

INTRODUCTORY PROVISIONS: SOURCES OF LITIGATION RULES:

1. Legislation - *Supreme Court Act 1933* (ACT) ('SCA'); *Court Procedures Act 2004* (ACT) ('CPA')
2. Rules – *Court Procedure Rules 2006* (ACT) ('CPRs')
    a. Application – 'Unless a territory law otherwise provides, these rules apply to all proceedings in the Supreme Court and Magistrates Court [except Domestic Violence Proceedings]' – r4
    b. Power to make rules derives from schedule 1 of the CPA 2004; there is a rule making committee created under s9 CPA; *Schutt Flying Academy v Mobil*
3. Judicial Precedent
4. Practice Directions
5. Statutorily enshrined Administration of Justice Powers – *s20 SCA*
    a. The court has all original and appellate jurisdiction necessary to administer justice in the Territory (s20(1)(a) SCA), jurisdiction conferred by a Commonwealth Act of Territory Law (s20(1)(b) SCA).
    b. Unless required under Commonwealth or Territory law, the ACT Supreme Court is not bound to exercise its powers if it as concurrent jurisdiction with another court or tribunal (s20(1)© SCA).
6. Supreme Court's Inherent Jurisdiction – derives from status as Superior Courts of Record – *R v Norwich Crown Court ex part Belsham* All ER
    a. 'The authority to adjudicate vested in a court as a consequence of it being a court of a particular description, notable a superior court of unlimited jurisdiction' – *R v Forbers; Ex Parte Bevan*
    b. 'Its overall purpose is to allow courts to regulate their own process and to prevent abuse of process' – *Riley McKay v Mckay*
    c. Arguably not an 'unlimited reservoir' from which new powers can be fashioned at will – 'procedural revolutions should occur first in statutes or in Rules of Court', not in the law reports' – *Dockray*
        i. Couched in rule of law principles and separation of powers doctrine.

JUSTICE AND EFFICIENCY: BROAD CONCEPTS TO BE INTERGRATED IN TO THE EXAM ANSWER

General Rule: The overriding purpose rule (r 21 CPRs) provides a yardstick against which interlocutory acts and decisions are measured. It states that the overriding purpose is to facilitate the **just resolution of real issues** in civil proceedings with minimum delay and expense (r21(1)), and that the court procedure rules are to be applied to achieve **a just resolution** of the issues (r21(2)(a)) and a **timely disposal** of proceedings at **a cost affordable to the parties** (r21(2)(b)). The parties must help the court to achieve these objectives (r21(3)).

- The court may impose appropriate sanctions if these rules or an order of the court is no complied with – r21(4)

Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146

FACTS:
- Queensland government entered into a contract with JL holdings. The contract was breached, and a claim was brought on that basis, as well as for breach of copyright and breach of statutory duty.
- The proceedings had already been on foot for a number of years, when the Queensland government decided to amend its defence.
- In the Federal Court, Kiefel prioritised efficiency over justice by holding that a party is right to view their access to substantive justice as subject to the requirements of efficiency, and thus did not allow Queensland to amend the defence and prolonge proceedings further.

HELD:
- The HCA reversed the Federal Court's decision, finding that it was in the interests of substantive justice that the Queensland government could amend its pleadings – even at such a late stage in the proceedings and after considerable delay.

Reversed By →

Aon Risk Services v Australian National University (2009) 239 LR 175

FACTS:
- In 2003 bushfires destroyed ANU property (an observatory). Aon, the ANU's insurance brokers (they decide the types of policies relevant to ANU, as a highly diverse institution). The insurance company claimed that ANU's insurance did not cover bushfire damage.
- ANU sued the insurance company, claiming the loss was covered, as well as Aon for breaching their contractual requirement to procure suitable insurance cover.
- 1 week before the trial is due to commence, ANU settles with the insurer and seeks to amend its pleadings in its claim against Aon, the broker. Applying JL Holdings, the ACT Supreme Court allowed for the amendment on the literal eve of the trial.

HELD:
- The HCA reversed the decision of the Supreme Court, finding that matters of efficiency, in this instance, outweighed those of justice. The Court held that it is difficult to compensate for the costs of beginning the trial anew, and we must

consider the effects that this delay would have on other would-be litigants and on an already over-burdened court system more generally.

ALTERNATIVE DISPUTE RESOLUTION

1. WHAT ARE THE FORMS OF ADR

A. DETERMINATIVE PROCESSES

This occurs in adjudication, arbitration, expert determination and early neutral evaluation, where a third party makes a determination.

Appropriate where a winner/loser resolution is appropriate, and where parties to not have an ongoing relationship or dispute.

Neutral Evaluation: A neutral evaluation is a process of evaluation of a dispute, where the evaluator identifies and reduces the factual and legal areas of dispute, and seeks to offer an opinion about the likely success of parties' cases, including findings of liability or the award of damages (r1176(3-4))

B. FACILITATIVE PROCESS:

This occurs in mediation, lawyer assisted negotiation and conciliation, where a third party assists the parties to resolve the dispute amongst themselves.

Appropriate where parties have an ongoing relationship, and perhaps also where parties have equal bargaining power.

Negotiation: Negotiation involves a collaborative approach, involving mutual agreement and consequently mutual gain (rather than maximising individual gain).

Mediation: A mediation is a negotiation process where a mediator (a neutral and independent party) assists parities to achieve their own resolution of the dispute (r1176(1)).

2. WHEN WILL ADR OCCUR?

A. WHEN WILL PARTIES ENGAGE IN ADR VOLUNTARILY?

Solicitors are required to inform their clients about ADR (rule 7.2 of the Australian Solicitors Conduct Rules). Parties may choose to engage this process of their own discretion where they identify one or more of the following benefits: less costly, private, speed, confidential, more likely to be a satisfactory outcome, more control over outcome, removal of court backlogs

B. WHEN ARE PARTIES COMPELLED TO ENGAGE IN ADR?

I. COURT ORDERD ADR

The Court may order the referral of a proceeding, or a part of a proceeding, for mediation or neutral evaluation - by a court appointed mediator or evaluator (r1179(3-4))- either on its

own initiative or on the application of a party to the proceeding (r1179(1-2)) (s195 CLWA). The Court also has the power to order payment of costs for the processes (r1181).

The Court is likely to exercise this discretion where there is a long-term relationship between parties (e.g. family relationship where good will exists), where the evidentiary base for the claim is complete (*Johnston v Johnston* [2004] NSWSC), where mediation can occur alongside preparation for litigation (*Daya v CAN Reinsurance Co Ltd* [2004] NSWSC 795), where there are few sophisticated commercial issues (*Johnston v Johnston*, *Morrow*).

A court is unlikely to order mediation where a party's unwillingness to pursue mediation may result in increased delay and expense (*Morrow v Chinadotcom* [2001] NSWSC 209). However, Hamilton J in *Singh v Singh* said a 'culture shift' had occurred since chinadotcom and courts now more willing to compel unwilling parties.

II. FAMILY LAW MANDATORY ADR

In Family Law, ADR is the primary method for resolving parenting dispute. There is a mandatory obligation to attend family dispute resolution prior to filing an application in child-related proceedings where there is a threat of child abuse (s601(8)-(10) *Family Law Act 1975* (Cth)).

III. ENFORCEMNET OF AGREEMENTS TO MEDIATE

Enforcement of agreements to mediate (*Scott v Avery* clauses): parties may be compelled to engage in dispute resolution prior to litigation if a contractual clause between the parties is drafted in *Scott v Avery* form. That is, it must make dispute resolution a condition precedent to litigation and be drafter with the requisite certainty as to the procedures to be followed by the disputants (*Hooper Bailie*, *Elizabeth Bay*). If the essential terms are not stipulated, the contract to mediate will not be enforced by a court, as it will be interpreted as merely an 'agreement to agree' (*TA Mellen v Allgas Energy*)

Essential procedural steps:

- No specification of the guidelines for mediation: Elizabeth Bay Developments
- No determination what share of the mediator's costs would be borne by each of the parties: *Aiton Australia Pty Ltd v Transfield Pty Ltd*
- Didn't specify which expert would be appointed to head the mediation: *State of NSW v Banabelle Electrical Pty Ltd*
- The essential terms were not specific enough- assumed that all terms could be imported from a dispute resolution service: *Heart Research Institute Limited v Psiron Limited*

IV. COMMONWEALTH DISPUTES

There is an obligation on parties to file a statement that they have taken 'genuine steps' to resolve the dispute prior to the commencement of litigation at the Federal Circuit Court or the

Federal Court (secs 6-7 *Civil Dispute Resolution Act 2011* (Cth)). Genuine steps include considering whether the dispute could be resolved by alternative dispute resolution (s4(1)(d)).

3. WHAT RULES GUIDE MEDIATION AND OTHER FORMS OF ADR?

A. DUTIES OF THE PARTIES

Parties under a duty to participate 'genuinely and constructively' (r1180) or 'genuinely and sincerely' (s196 CLWA) in the mediation.

- Although courts have been reluctant to enforce as seen as being repugnant to the rights of participants to pursue their own interest: *Walford v Miles*, have been more willing when the duty is statutory in nature: *Western Australia v Taylor*

Aiton v Transfield – Einstein J applying s 110K *NSW Supreme Court Act* 1970
HELD: Non-Exhaustive "essential content" of good faith obligation:

1. Undertake to subject oneself to process;
2. To have an open mind in the sense of:
    a. Willingness to consider appropriate options for resolution put forward by the mediator or opposing party.
    b. Willingness to consider putting forward own options for resolution.
3. Does not oblige party to:
    a. Act for or in interests of the other party
    b. To act other than by regard to self-interest.

B. WHAT COMMUNICATIONS REMAIN CONFIDENTIAL?

Confidentiality may be protected by contract (confidentiality clause), privilege, statute, court orders.

I. CONTRACT

- Confidentiality clause in mediation agreement will bind parties, but not the third-party mediator

II. STATUTE

- Mediation material is not admissible in proceedings except in accordance with s 131 *Evidence Act 2011* (s9 *Mediation Act 1997* (ACT)). S131 provides that evidence is not to be adduced of a communication or a document made between persons in a dispute in connection with an attempt to resolve that dispute.
- A mediator shall not disclose information obtained in mediation except: as required by law, with consent of parties, consent of person who gave the information, when there are matters of life or death, when disclosure necessary in order to report commission of an offence (s10 *Mediation Act 1997* (ACT))

III. PRIVILEGE

- Mediation material is protected by the Without Prejudice Privilege unless it is being used to 'sterilise' documents that should have been discovered in the ordinary course

of litigation (Rolfe J, *AWA Ltd v Daniels* (later approved by Lee J in *Williamson v Schmidt*)) or where there has been misleading and deceptive conduct in the mediation (*Quad Consulting v Bleakley*).

- Note: where the matter is referred to mediation by court, the scope of confidentiality attaching to the mediation may be dependent upon a court order: *Williamson v Schmidt*
- Protected by legal professional privilege s118 *Evidence Act*) - Often waived in a mediation context as legal advice is often disclosed to other party

IV. COURT ORDER

- In neutral evaluation, communications have the same privilege as in relation to defamation that exists for a proceeding in the court (r1183(1)).

C. WHO MAY BE A MEDIATOR/ NATURAL EVALUATOR?

Mediator must be registered under the *Mediation Act 1997* (ACT) and be court appointed (r1177(1)-(2)) Neutral evaluator may be the register of the court, or someone that the court considered to have the skills and qualifications of an evaluator and appoints as an evaluator (r1178(1)).

4. IS THE MEDIATION OUTCOME BINDING AND ENFORCEABLE?

- The Court may make orders to give effect to an agreement or arrangement between the parties arising out of a mediation session or neutral evaluation (*CL (W) Act* s 198; Rule 1182 CPA (1))
- Settlement must actually be reached (look to the nature of the agreement, purpose for the meeting and disclosed intention). *Barry v City West Water*
- Final agreements in mediation are enforceable by contract law. They must have the requisite elements of a valid contract: offer, acceptance, consideration, intention to create binding legal relations.
- If the agreement is a final agreement, then it is immediately binding on the parties. *Masters v Cameron*

5. WHEN MEDIATION IS CONCURRENT WITH LITIGATION

- The court may give orders to give effect to the agreement between the parties arising out of mediation (r1182(1)).
- Parties may also wish to affect a deed of settlement and file a notice of discontinuance with the court (r1165).