

Topic 2

Pre-Litigation Steps and Appropriate Dispute Resolution

	<ul style="list-style-type: none"> • See CPA s 1 (application) and s 3 (definition of civil proceeding) • May also be consumer law remedies – eg where debt collection agency engages in misleading and deceptive conduct (eg <i>ACCC v ACM Group Limited (No 2) [2018] FCA 1115 (30 July 2018)</i>)
Pre Action Protocols	<ul style="list-style-type: none"> • Compulsory in UK, less uptake in Australia (note Fed Court) • Had been part of Vic CPA (repealed) – certification retained • Entrenched in transport crash compensation in Victoria <p>Practice Direction – Pre-Action Conduct and Protocols (UK) Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—</p> <ul style="list-style-type: none"> (a) understand each other's position; (b) make decisions about how to proceed; (c) try to settle the issues without proceedings; (d) consider a form of ADR to assist with settlement; (e) support the efficient management of those proceedings; and (f) reduce the costs of resolving the dispute.
Remember CPA Obligations in Victoria	<p>Before issuing proceedings, must consider:</p> <ul style="list-style-type: none"> • Overarching obligations in Part 2.3 • Sanctions for contravention in Part 2.4 • Certification requirements in Part 4.1 <p>Sanctions</p> <ul style="list-style-type: none"> • s 28: Court can take account of any contravention in exercising any power in relation to a civil proceeding • s 29: Where satisfied of contravention on balance of probabilities, court can make order it considers appropriate in the interests of justice, including: <ul style="list-style-type: none"> ◦ Orders for payment of costs ◦ Order that person take steps to remedy contravention ◦ Order preventing a person from taking specific steps in the proceedings
On commencement CPA Certification	<ul style="list-style-type: none"> • OO certification - s 41: Each party must personally certify that they have read and understood the overarching obligations and the paramount duty • Proper basis certification - s 42: Lawyer must certify proper basis • Certificates must be filed with the first substantial document filed by the party, ie Statement of Claim (P), Defence (D) <p>Compare Fed Court requirements under the <i>Civil Dispute Resolution Act 2011</i> (Cth):</p> <ul style="list-style-type: none"> • Parties required to take 'genuine steps' to resolve or narrow issues in dispute before issuing certain types of civil proceedings • 'Genuine steps' may be the exchange of correspondence, information and documents relating to the dispute, and considering options for resolving the dispute without litigation, including facilitated negotiation. • Once litigation commenced, parties must certify whether satisfied the pre-litigation requirements - non-complying parties must explain why not
The evolution of ADR in Civil Justice	<ul style="list-style-type: none"> • 'ADR refers to a range of ways that people can resolve disputes without resorting solely to court and tribunal hearings for determination. Progressing disputes through formal court and tribunal processes is resource intensive and can be lengthy, costly and stressful for the parties involved... For some disputes, it is more appropriate for parties to seek a resolution through the use of ADR.' (Productivity Commission, <i>Inquiry Report: Access to Justice Arrangements</i> (December 2014), 284)
ADR versus litigation?	Some limitations of litigation

	<ul style="list-style-type: none"> • Unpredictable outcomes • Win-lose outcomes • Delayed, expensive • Stressful • Process focused on legal rights • Damage to relationships • Publicity <p>Potential benefits of ADR</p> <ul style="list-style-type: none"> • Flexibility • Control of parties • Privacy • Cheaper, faster • Creative solutions • Enforcing outcomes • Communication, relationships <p>In the presentation of ADR in opposition to litigation a 'false dichotomy' (Astor and Chinkin, 2002)</p>
The dispute pyramid	 <p>Albiston CR, et al. 2014. Annu. Rev. Law Soc. Sci. 10:105–31</p>
Varieties of ADR	<p>Box 8.1 Exploring ADR processes</p> <p>Unlike negotiation, where parties in dispute interact directly with each other, ADR involves an independent practitioner who assists parties to attempt to reach a resolution.</p> <p>Facilitative processes assist parties in dispute to identify issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Examples of facilitative processes include mediation, conciliation and facilitated negotiation.</p> <p>Advisory processes consider and appraise the dispute to provide advice on the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these may be achieved. Examples of advisory processes include case appraisal, conciliation (where advice is offered) and neutral evaluation.</p> <p>Determinative processes evaluate the dispute, including the hearing of formal evidence from parties in dispute where appropriate, before making a determination. Examples of determinative processes include arbitration, expert determination and private judging.</p> <p>Source: AGD (2013a).</p>

<p>The ADR Process Continuum</p>	<p style="text-align: center;">The ADR Process Continuum</p> <p style="text-align: center;">Direct (simple bilateral) negotiation Facilitated negotiation Conciliation Litigation</p> <p style="text-align: center;">Indirect negotiation Mediation/ facilitation Arbitration</p> <p style="text-align: center;">← Maximum party control over process and outcomes Soft non-adversarial, less adversarial</p> <p style="text-align: center;">Minimum party control over process and outcomes Hard non-adversarial, more adversarial →</p>
<p>Mediation</p>	<p>'Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.'</p> <p>(NADRAC in Bamford and Rankin (2014, p 215))</p>
<p>ADR Under the Civil Procedure Act 2010(Vic)</p>	<ul style="list-style-type: none"> • CPA supports and promotes ADR in a number of ways • Civil proceedings defied in s 11 to include ADR in a proceeding • Overarching obligations (set out in Part 2.3 (ss 16-27)) apply in respect of conduct of any aspect of a civil proceeding (incl ADR) <ul style="list-style-type: none"> ◦ eg s 22 – OO to use reasonable endeavours to resolve dispute • Part 2.4 – sanctions for contravening OOs – broad powers • Part 4.2 – case management powers (ss 47, 48) <p>Chapter 5 – ADR</p> <ul style="list-style-type: none"> • s 66(1): Court may order proceeding (or part) to ADR • s 66(2): May make order under (1) without consent of parties, provided order is not for arbitration, reference to special referee, expert determination or any other ADR that results in binding outcome • Note – includes a judicial mediation conference • <i>Bolitho & Anor v Banksia Securities Limited & Ors (No 7) [2020] VSC 204 (27 April 2020)</i> – when is mediation not appropriate?
<p>Court-Annexed ADR</p>	<p>Mechanisms of Court Incorporation of ADR</p> <ul style="list-style-type: none"> • Requiring ADR before court proceedings are commenced • Judges making referrals to ADR during proceedings • Judges and registrars conducting ADR processes <p>In the Supreme Court of Australia</p> <ul style="list-style-type: none"> • CPA provisions (note s 69 – powers are additional to and do not derogate from others relating to ADR) • SCR Order 15 – deals with references to ADR • Practice Notes <ul style="list-style-type: none"> – eg Judicial Mediation Guidelines (2020) (note CPA s 66 - Court authorised to order judicial resolution conference which includes judicial mediation) <p>Relevance of the <i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i> s 24(1)</p>

	<ul style="list-style-type: none"> Party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing
Enforcement of ADR	<p>Participation in ADR</p> <ul style="list-style-type: none"> 'Good faith' requirement common in commercial DR clauses CPA s 22 requires use of reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by ADR, unless it is not in the interests of justice to do so, or the dispute is of such a nature that only judicial determination is appropriate <p>ADR outcomes</p> <ul style="list-style-type: none"> At conclusion of ADR process, if parties agree to settlement terms, will have binding effect if agreement drawn up
Consequences in ADR	<p>A 'second class of justice'?</p> <ul style="list-style-type: none"> Courts as public institutions Private nature of ADR – impact of entrenched inequalities and power imbalances Mandated ADR and access to justice When is it not appropriate? <p>Lack of empirical data – criticism by Productivity Commission</p> <p>Baruch Bush and Folger (1994) - four stories of mediation</p> <ul style="list-style-type: none"> The 'satisfaction' story The 'transformative potential' story The social justice story The (less positive) oppression story

<i>Bolitho & Anor v Banksia Securities Limited & Ors (No 7) [2020]</i>		
<i>Facts</i>	<i>Issue</i>	<i>Held</i>
2012: Banksia finance collapses, owing 16,000 investors \$660m 2018: Class action settles for \$64m, which court approves 2019: SCV refuses to approve legal fees (\$5m) and funder commission (\$13m) after group member objection April 2020: Interlocutory decision on application for judicial mediation by litigation funder – opposed by the contradictor (All before 2021 high profile remitter trial in SCV – fraudulent fees scheme perpetrated by lawyers, conflicts of interest, misleading court (multiple disciplinary breaches) – mid-trial capitulation by barristers, practitioners struck off, consequences still playing out)	<ul style="list-style-type: none"> Whether the conduct of the solicitor, funder, and counsel in relation to the litigation funding scheme amounted to misconduct, breach of duty, or abuse of process. Whether the receivers could claw back fees and distributions improperly obtained. 	<ul style="list-style-type: none"> Justice Dixon of the Supreme Court of Victoria found that the solicitor, funder, and counsel engaged in egregious misconduct, including attempts to mislead the court and manipulate fee recovery. The court held that the conduct was an abuse of process and contrary to the obligations owed to the court and class members. Substantial adverse findings were made against the individuals, with orders for them to account for monies received and to repay amounts to ensure fairness to group members.

Topic 3 Costs		
Costs in Litigation		
Relevance of Costs	<ul style="list-style-type: none"> Costs influence access to justice, litigation strategy, settlement, and court resources. <i>Example:</i> The Bell Group case cost WA taxpayers ~\$14m in unrecovered court resources. 	
Terminology	<ul style="list-style-type: none"> Billing: time-based, item billing, fixed fees, conditional fees (no win, no fee), uplift fees ($\leq 25\%$), contingency fees (prohibited except s 33ZDA class actions). Costs orders: party-party, solicitor-client, indemnity, disbursements, transcript. Self-represented litigants: cannot recover their time (except self-represented lawyers). 	
General Rule – Costs Indemnity Rule	<ul style="list-style-type: none"> English rule (loser pays) applies in Australia (SCR r 63.01, SCA s 24). Default: costs taxed on a standard basis (reasonable costs). Indemnity basis: all costs allowed unless unreasonable. Doubts resolved in favour of payee. 	
Exceptions to Costs indemnity Rule	<ul style="list-style-type: none"> Partial success: court may apportion (e.g. <i>Byrns v Davie</i>; <i>KSG Investments v Open Markets</i>). Public interest litigation: can justify indemnity costs if successful, but no shield if unsuccessful (<i>AFCO v Tobacco Institute</i>; <i>Bat Advocacy</i>). Protective costs orders (CPA s 65C; <i>Bare v Small</i>): court may cap costs liability if consistent with overarching purpose. Settlement offers rejected: <i>Calderbank</i> offers ("without prejudice save as to costs"): may lead to indemnity costs if not beaten. Offers of Compromise (O 26): strict rules; failure to beat offer affects costs. 	
Civil Procedure Act (CPA) & Costs	<p>s 24: Overarching obligation – ensure costs are reasonable & proportionate to complexity/amount.</p> <p>ss 28–29: Courts can impose cost sanctions for breaches of overarching obligations (OOs). Orders can be compensatory & punitive.</p> <p><i>Yara Australia v Oswal:</i> overrepresentation and excessive materials breached OOs → sanctions possible.</p>	
Costs Against Lawyers	<ul style="list-style-type: none"> Lawyers may be personally liable if costs incurred improperly, unreasonably, or due to incompetence/delay. <i>Hera Project v Stevenson:</i> solicitor ordered to pay indemnity costs for incompetence (mismanagement of contempt hearing). 	
Interlocutory Proceedings	<ul style="list-style-type: none"> Default: costs are "costs in the proceeding" unless court orders otherwise (r 63.20, r 63.22). Reserved costs follow the same rule unless court specifies. 	