MODULE 1

RESPONDING TO CIVIL DISPUTES: DEFINING CIVIL DISPUTES

1 WHAT ARE CIVIL DISPUTES?

Where people who have a disagreement are unable to resolve that disagreement, and it leads to a claim of a legal right or entitlement (whether or not legal proceedings are initiated), then a civil dispute exists.

Civil disputes may involve individuals, partnerships, corporate entities, or government.

They may involve claims under contract law, equity, corporations' law, family law, tort law, consumer protection law, administrative law, and other non-criminal matters.

Criminal matters are not civil disputes, but many civil disputes involve criminal matters arising from the same relationships between people

2 SIGNIFICANCE OF PROCESS

The way in which civil disputes are dealt with is vital to the Rule of law. If there is no state sanctioned way to resolve these disputes, or those pathways are inaccessible, then there is a problem with access to justice, the authority of the law in guiding people's actions, and the common law. It is essential that law graduates understand the entirety of the landscape in which civil disputes are acknowledged, managed, and resolved. This Unit will focus in particular on the way in which the superior court in Tasmania manages the pre-trial litigation process. However, this detailed exploration will be situated within the context of the broad civil dispute resolution system.

Another way of assessing a dispute in terms of selecting an appropriate dispute resolution process is to consider the following specific factors (Astor and Chinkin, 1991, 188):

- What is the nature of the dispute?
- What time factors apply to the dispute—is there a need for a speedy determination or is there some flexibility about time frames?
- What is the monetary value (if any) of the subject of the dispute?
- What is the factual and legal complexity of the dispute?
- Is there a need for an authoritative ruling with precedential effect?
- What are the objectives of the parties?
- What is the nature of the relationship between the parties, including any power imbalance between them?
- What is the ability of the parties to negotiate without third party assistance?
- What resources are available for the resolution of the dispute?
- How many parties are there to the dispute?
- Do the parties have a continuing relationship?
- Is there a need for privacy?

6 ASSESSING THE SUITABILITY OF PROCESSES FOR DISPUTES

Process Options	Legal and Non-Legal Factors Influencing the Decision-Making Process
Mediation	Mediation is suitable when parties: • want to have some type of continuing relationship • *want control over the dispute resolution process* and agreement at end • want to *minimise costs and delay* • want the *dispute resolved confidentially* • need a *tailor-made resolution* which addresses many issues and needs • have a *genuine desire to resolve the dispute* **WITHOUT** *commencing or continuing litigation*
Conciliation	Conciliation is suitable where: • there is a level of conflict such that the parties *require a more directive facilitator*

	S 4(1)(a)
Tort (general NOT personal injury)	6 years S 4(1)(a)
Personal Injury in TORT	3 years from the 'date of discoverability' S 5A
Actions by a Beneficiary AGAINST a trustee to recover trust property or for breach of trust	6 years S 24(2)
Deed or Specialty	12 years S 4(3)
Recovery of Land	12 years – by any other person S 10(2) 30 years – by the Crown
Judgement	12 years S 4(4)
Rent (or Damages in Respect of Rent)	6 years S 22
Money Secured by a Mortgage	12 years from the date the right to receive money accrued S 23
Defamation	1 year S 20A of the *Defamation Act 2005* (Tas)
Personal Injuries arising from Childhood Sexual or Serious Physical Abuse	No limitation S 5B

4 WHY LIMITATION PERIODS?

- To protect defendants from perpetual risk of having legal action commenced against them
- Plaintiffs with good causes of action should pursue them with reasonable diligence
- Defendants should not have to keep evidence to defend themselves indefinitely
- Long dormant claims have more cruelty than justice in them

- Guardian and administrator or person with whom a person under a disability resides – Rule 136
- Crown proceedings to be served on the Director of Public Prosecutions – s 13(4) *Crown Proceedings Act 1993* (Tas)

5 SERVICE ON CORPORATIONS

There are two ways to serve a corporation - either by personal service on a human being who is a prescribed person to receive service on behalf of the company or by leaving and posting the process to the registered office of the company. The requirement for service to occur within the jurisdiction of the court applies to these kinds of service.

(a) Rule 137 – Personal Service on a Relevant Officer of the Corporation

- Mayor, President or another Head Officer; or
- General Manager
- Treasurer
- Manager; or
- Secretary

(b) Corporations Act Section 109X – Alternative Means of Service on a Corporation

Leaving or posting to the company's registered office;
Delivering a copy personally to a director who resides in Australia; or
If the company has a liquidator or administrator appointed, by leaving or posting to that person.
Note: the registered office is NOT the same thing as the place of business.

6 PROOF OF SERVICE

Unless a defendant files an unconditional appearance or defence, service must be proved.

The requirements of an affidavit of service are set out in Rule 143.

Usually a process server is engaged to effect personal service. It can be a hazardous occupation, as people are not typically enthusiastic or pleased to be served with a writ.

7 SERVICE OUTSIDE JURISDICTION

(a) Within Australia

Service and Execution of Process Act 1992 (Cth) especially sections 55 and 9

- No leave of the court is required.
- Rules of manner, proof and affidavits of service – as per the originating jurisdiction.
- Provisions for service of both human beings and corporations outside the territorial jurisdiction of the relevant court.

(b) Outside Australia

- Rule 431 Costs will usually be borne by the amending party.
- Rule 432 Allowing or disallowing amendments.

Mirkazemi v Manns [2009] TASSC 91	
Significance	Have a look at para [11] where Associate Justice Holt said: "The distinction between sub-Rules (1) and (2) of r 427 is that sub-Rule (2) only applies to amendments which are necessary for the purpose of determining the real questions in controversy. It does not apply to other types of amendment including amendments designed to set up a new case." The fact that there is a distinction between the two kinds of amendments was considered to be significant and to indicate that they ought to be dealt with differently. There is no right to amend pleadings to introduce a new cause of action. The exercise of discretion will be applied to such applications.

5 WHY CASE MANAGEMENT HAS MADE A DIFFERENCE TO AMENDMENT APPLICATIONS?

The case management system, which has been enforced more readily post-AON, requires that parties define their disputes early and make careful decisions about the scope of their pleadings. The overseeing of the pleading process by the court gives ample opportunity for earlier identification of faults or missing issues in the pleadings. Therefore, where the courts closely manage the pre-trial process more weight might be expected to be placed on principles of efficiency and the retention of trial dates.

6 SOME PRE AND POST AON DECISIONS ABOUT AMENDMENTS

Erna v Arif [1999] 2 VR 352	
Significance	This case is a good illustration of the impact of JL Holdings on the approach to late amendments. The application for amendment was made during final submissions. It had been prompted by observations made by the judge during the hearing. The application was granted, and appeal was brought to the Victorian Court of Appeal. You cannot really apply to amend your pleadings much later than during final submissions! The Appeal Court held that the question before the trial judge was whether it was just to allow the amendment. The interests of justice in this case were held to have required that the amendment application be granted. The basis upon which the court made its determination was that the amendment was necessary for the real questions in controversy to be determined by the court. The court will normally make any amendments that are necessary for this purpose.

	interlocutory procedures without undue delay. Cases like this are an embarrassment to the Court. They cause individuals to lose respect for the authority of the Court and, in the words of French CJ, "confidence in the rule of law" ([87] per Blow J). In this case the defendant failed to comply with interlocutory orders that had been made and ceased to participate in the case management process. In response, the Associate Judge ordered that the defence and counterclaim be struck out. The plaintiff subsequently entered judgment in default of defence. The defendant appealed this judgment. You can read paragraphs [2]-[34] for a description of the long, arduous litigation process. Case management considerations are discussed at paragraphs [84]-[88]. His Honour Justice Blow noted at paragraph 88 "With the litigation in its fifth year, Holt As J encountered conduct that was not just dilatory, but also contumelious. The proceedings before me were conducted with efficiency and professionalism, but otherwise the way in which this litigation has been conducted on behalf of the defendant since 28 May suggests that there is very little reason to expect any significant improvement in the application of the defendant company and its lawyers to the task of properly preparing the proceedings for a trial. If the proceedings were reinstated, I think the risk of further unnecessary delays and wasted costs would be high." His Honour dismissed the application and appeal. Therefore, the Associate Justice's consequence of striking out the pleadings was upheld as an appropriate response in the circumstances.

8 CONTROVERSIES AROUND CASE MANAGEMENT

Case management raises conflict between justice and efficiency. It potentially benefits or otherwise affects courts, parties, the public and other litigants. It raises tension between maintaining the integrity of the case management process and doing justice in this case.

> *If there are no sanctions for breach, does the case management system actually have teeth?*

Judges have varied views about case management. They support it in varying degrees. They may make differing decisions regarding case management determinations or enforcement. It is a discretionary area of law.

MODULE 4

PARTY MANAGEMENT: FORMAL OFFER OF COMPROMISE

A party may make a formal offer of compromise and lodge that offer with the court. Formal offers of compromise are made without prejudice unless they explicitly state otherwise (SCR 285).

1 WHAT IS A FORMAL OFFER OF COMPROMISE?

SCR 280. Offer of compromise

(1) A party to any proceedings may make to another party to the proceedings an offer of compromise of a claim of that other party or a claim made against that other party.

(2) An offer of compromise is to be –

(a) lodged with the registrar; and

(b) served on the other party.

(3) An offer of compromise may be made by a defendant by offering to –

(a) pay a nominated sum of money, clear of costs, to the plaintiff; or

(b) pay a proportion, expressed as a percentage, of the plaintiff's claim; or

(c) give the plaintiff any relief that the defendant contends is sufficient to dispose of the whole action or one or more causes of action.

(4) An offer of compromise may be made by a plaintiff by offering to –

(a) accept a nominated sum of money, clear of costs; or

(b) accept a nominated sum of money after giving credit to the defendant for any set-off or counterclaim raised by the defendant against the plaintiff; or

(c) concede a proportion, expressed as a percentage, of the plaintiff's claim; or

(d) accept any relief that the plaintiff contends is sufficient to dispose of the whole action or one or more causes of action.

(4A) An offer of compromise is to include a term as to costs as provided by rule 281(c)

(5) A party may make –

(a) more than one offer of compromise; and

(b) an offer of compromise to more than one party.

(6) A party may make an offer of compromise at any time before the commencement of the trial in respect of the claim to which it relates.

(7) An offer of compromise is open for any period, not less than 14 days after service of the offer, specified in the offer.

- When mediation is court-sponsored, it is part of a system whose business is justice, not just settlement.
- Departure from legal norms should be informed (legal advice).
- Legal cultural habits favour lawyers as spokespersons for clients (which can be a lost opportunity).
- Is compulsory mediation an oxymoron?

6 COMPULSION

Some people say that voluntariness is an essential feature of mediation, and that therefore compulsory is an oxymoron. Mediation is grounded in values of self-determination, empowerment and free will. If you take people's free choice away, then these values are compromised. The reality is that very few people choose mediation. Court-connected programmes are by far the most common form of mediation. However, the field is growing and mediation is becoming a more usual part of the commercial, workplace and community landscapes.

- ***What is compelled?***

Where your client has been referred to mediation, it is important to be aware of what exactly they are compelled to do so that you can advise them appropriately. This will vary between contexts. You will need to refer to legislative provisions, guidelines governing the particular mediation and any agreements that the client has entered, for example, the agreement to mediate. There is often an express provision enabling the parties to withdraw from mediation at any stage (although this is always an option regardless of whether there is express agreement).

- Attendance only.
- Attendance with authority to settle (SCR 519(4) Unless otherwise ordered or agreed by the parties, each party is to attend the mediation with authority to settle).
- To participate in good faith or making a genuine effort.
- Express permission to withdraw (*ADR Act* s6 A party to a mediation session or neutral evaluation session may withdraw from the session at any time).

7 HANDLING COMPULSORY MEDIATION

Because the mediation is not voluntary, you cannot assume that the other party is willing to participate in the process for the purpose of resolving the matter.

- Be mindful of institutional goals such as efficiency, and the impact this might have on the mediator's conduct.
- Inquire/investigate the degree of commitment to the process by the other party.
- Clarify own and other clients' goals in the mediation process.
    - It seems to us to be very early to be holding a mediation. What do you think we can reasonably achieve?

SCR 875 Judgment for delivery of goods = warrant of delivery

SCR 876 Judgment for specific performance = committal and sequestration

4 TIMING

Execution of judgment within 6 years (SCR 896)

Enforcement process goes stale if not executed within 1 year of issue (SCR 901)