

The Lifecycle of Civil Litigation

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Carl Coaster v State of Victoria

- Carl Coaster
- Bushland Thrills Park:
 - owned by the Department of Rollercoaster Regulation and Ferris Wheels Affairs (**DRRFWA**)
 - Wheel Wizards Training Institute – provides training
 - DRRFWA – designs training
- Francis Ferris – employee of Wheel Wizards





Agenda

Part 1 – Setting the scene

- a) Who is getting sued? State liability and immunities
- b) Who can assist you?
- c) Victorian Courts
- d) Model Litigant Guidelines and Civil Procedure Obligations
- e) Disputes between Victorian Public Sector Bodies



Agenda

Part 2 – Litigation Process

- a) Pleadings
- b) Discovery
- c) Subpoenas
- d) Identifying & preparing witnesses
- e) Damages
- f) Offers of settlement
- g) Costs and section 26 certificates
- h) Alternatives to litigation



Part 1: Setting the Scene



Part 1(a) – Who is getting sued?

Carl Coaster (the Plaintiff) v State of Victoria (the Defendant)

Section 23(1)(b) of the Crown Proceedings Act (Vic)

*The Crown shall be liable for the torts of any **servant** or **agent** of the Crown - or **independent contractor** employed by the Crown – as nearly as possible in the same manner as a subject is liable for the tort of his servant or agent or of an independent contractor employed by him.”*

Immunities or Indemnities?



Part 1(b) – Who can assist you?



Part 1(c) – Victorian Courts

Victorian Courts

- *Supreme (Trial Division and Court of Appeal)*
- *County*
- *Magistrates*

Types of hearings

- *Jury vs Judge*
- *Mention/directions hearings*



Part 1(c) – Victorian Courts

Judges and judicial officers

- *Judges*
- *Associate judges*
- *Judicial registrars*

Regulating court proceedings

- *Court rules*
- *Practice notes*
- *Civil Procedure Act 2010*



Part 1(d) – Model Litigant Guidelines and Civil Procedure Obligations

Model Litigant Guidelines

Honesty, fairness and consistency

Promptness and early assessment

Legitimate claims and alternative dispute resolution

Claimants lacking resources

Technical arguments

CPA obligations

Act honestly

Ensure there is a proper basis

Only take steps to resolve or determine a dispute

Cooperate with the parties and the court

Do not mislead or deceive

Use reasonable endeavours to resolve a dispute

Narrow the issues in dispute

Ensure costs are reasonable and proportionate

Minimise delay

Disclose the existence of documents



Self-represented litigants

- Confirm you are not their lawyer and cannot give them legal advice
- Make it clear that you act for your client and will act in their best interests
- Make it clear that any communication with you is not confidential
- Suggest they seek independent legal advice



Consequences of non-compliance

- **JUDICIAL**
- **REPUTATIONAL**
- **PERSONAL**



Civil Procedure Act

Paramount duty – s 16

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to –

- (a) any interlocutory application or interlocutory proceeding;*
- (b) any appeal from an order or a judgment in a civil proceeding;*
- (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.*



Civil Procedure Act

OVERARCHING OBLIGATIONS

Act honestly at all times (s 17)

Use reasonable endeavours to resolve dispute (s 22)

Requirement of proper basis (s 18)

Narrow issues in dispute (s 23)

Only take steps to resolve or determine dispute (s 19)

Ensure costs are reasonable and proportionate (s 24)

Cooperate in conduct of civil proceeding (s 20)

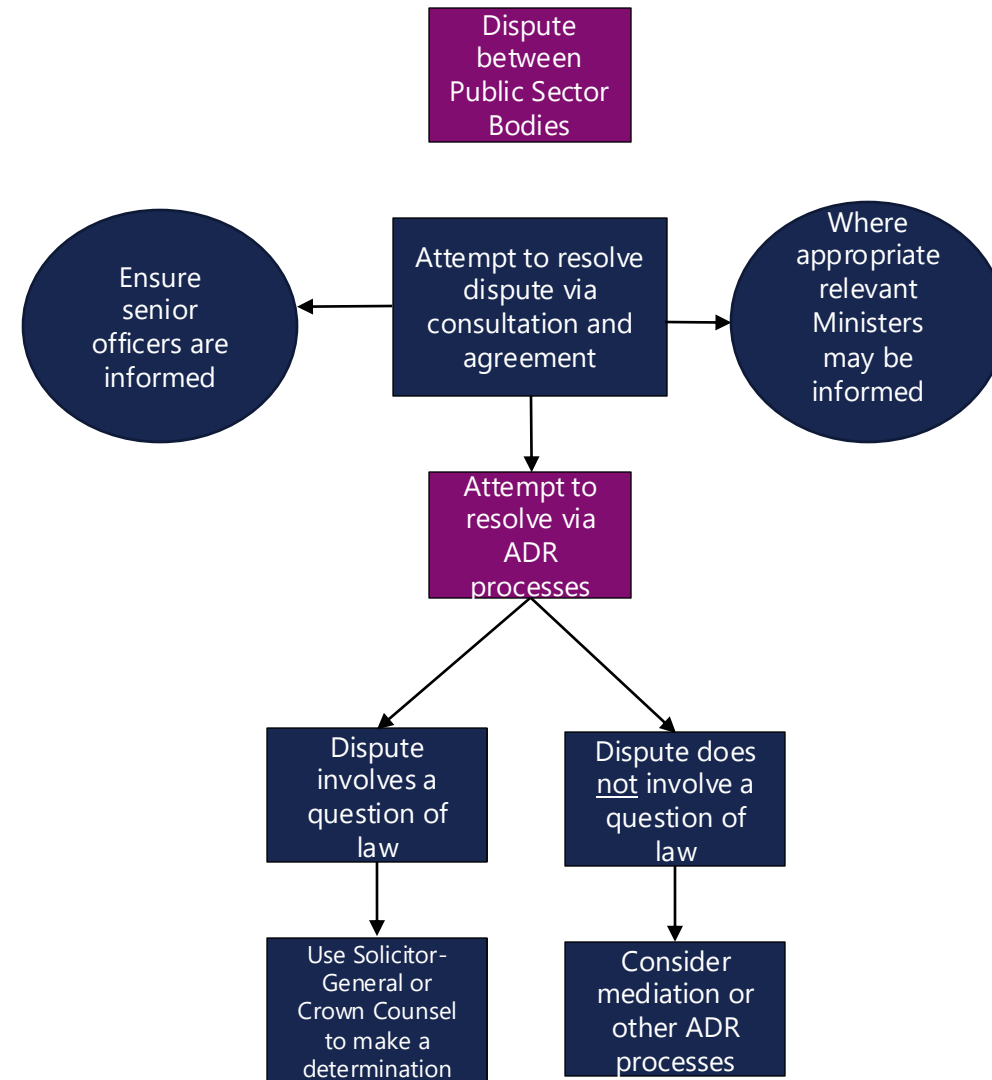
Minimise delay (s 25)

Don't mislead or deceive (s 21)

Disclose existence of documents (s 26)



Part 1(e) – Disputes between Victorian Public Sector Bodies



Questions





Part 2: Litigation Process



Part 2(a) – Pleadings

Writ and Statement of Claim

Notice of the proceeding

Sets out the allegations against the State

Notice of Appearance

Due 10 days from service of the Writ

Jury Notice

Should you file one?



Part 2(a) – Pleadings

Defence

Generally due 30 days after the Notice of Appearance

Your response to the allegations in the Statement of Claim

Preparing a Defence

Order 13 of the court rules sets out the formal requirements for pleadings

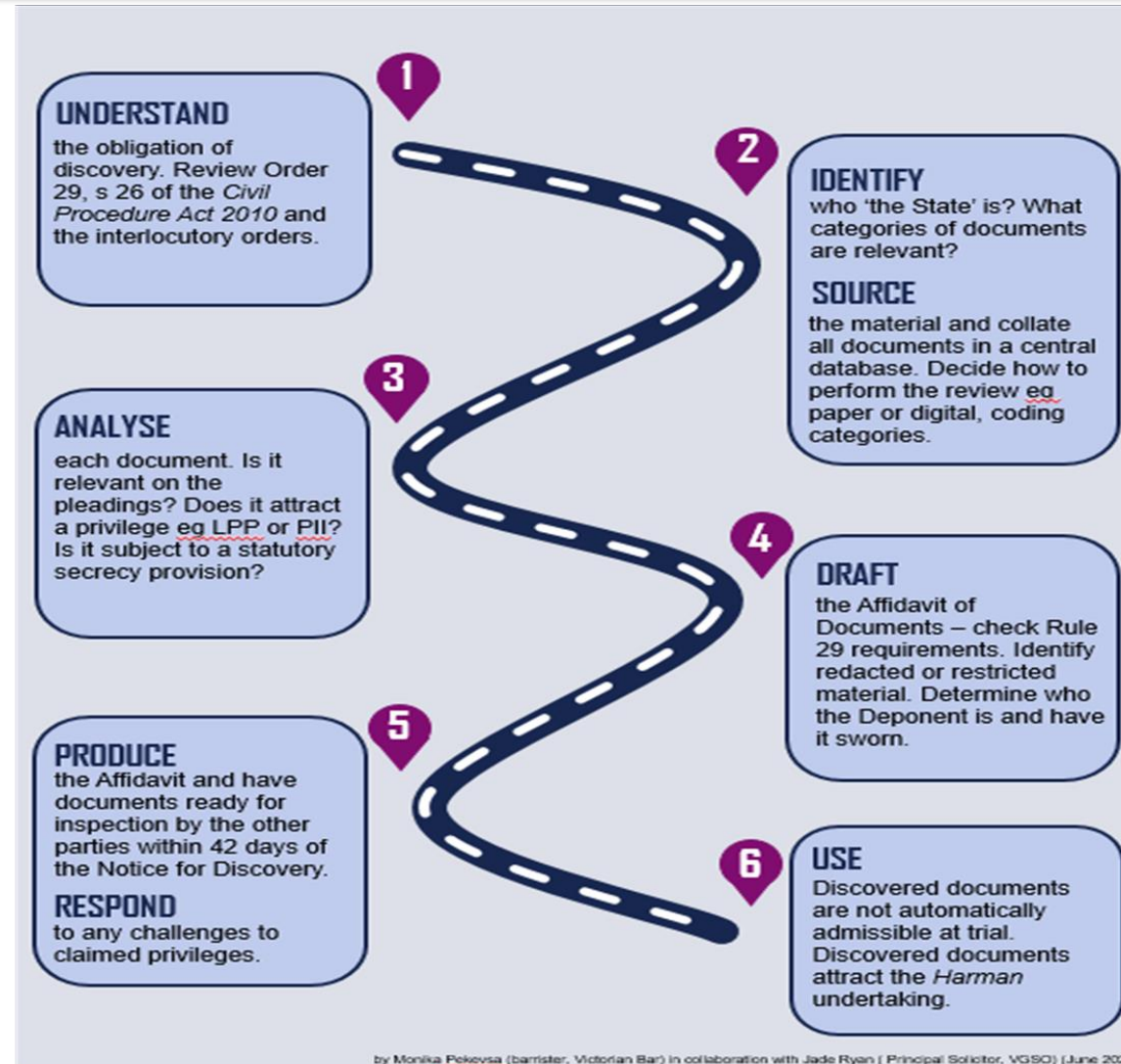
Either admit, not admit or deny the allegations in the Statement of Claim

Gather information from your client to assist you in preparing the Defence

Overarching obligations and proper basis certification



Part 2(b) - Discovery



Part 2(b) - Discovery

1. Obligation to discover

Documents on which a party relies, that adversely affects a party's case, that adversely affect another party's case and that support another party's case

Documents are not just limited to written documents

Timing for completion of discovery

Continuing obligation to discover

The Harman Undertaking

2. Who is the 'State' for the purpose of discovery

This will be determined by reference to the pleadings, to identify the individuals whose conduct is the subject of the claim or the government agencies whose conduct is challenged



Part 2(b) - Discovery

3. Source and collate documents

4. Analyse the documents

You will need to undertake the process of analysing the documents to determine:

- whether they are relevant; and
- assuming they are, whether there is any ground to object to the production of the document in whole or part:
 - Privilege;
 - Redactions.



Part 2(b) - Discovery

5. Draft the Affidavit of Documents

Form of an Affidavit of Documents

Identifying the deponent for an Affidavit of documents

6. Production of documents

Inspection of documents

Challenges to withheld documents

Admissibility of discovered documents



Part 2(c) - Subpoenas

What is a subpoena?

A court order compelling production of documents and/or to attend court to give evidence

What do you need to produce pursuant to the subpoena?

Only documents in your possession – **do not** create documents or seek them from other departments or organisations



Part 2(c) - Subpoenas

Where do you produce the documents?

To the issuing court registry – **do not** provide them directly to the issuing party

What if you cannot comply in time?

Contact the issuing party immediately

You may consider court intervention if you cannot obtain agreement from the issuing party



Part 2(c) - Subpoenas

Setting aside a subpoena

No legitimate forensic purpose

Not relevant to issues in dispute – ‘fishing’

Lacks sufficient particularity – e.g. is the subpoena too broad?

Oppressive



Part 2(c) - Subpoenas

Confidentiality and Privilege

Common claims include:

- Public interest immunity
- Legal professional privilege
- Irrelevant third-party information
- Commercial-in-confidence
- Statutory non-disclosure obligations



Part 2(c) - Subpoenas

Use of subpoenaed documents

Can be tendered in evidence at trial

Can be provided to third-parties in connection with the proceeding

Cannot be used for a collateral purpose



Part 2(d) – Identifying and preparing witnesses

Types of government witnesses

- *Personal Capacity Witness* – a person who had direct involvement in the events being considered. They usually have some first-hand knowledge or observation of relevant events.
- *Official Capacity Witness* - a person who is usually a ‘quasi-expert’ and are selected to explain organisational policy or programs, or the implementation of reform.

Selecting and preparing government witnesses

- There are different matters to consider when selecting and preparing a personal capacity witness compared to an official capacity witness.



Part 2(e) – Damages

Economic loss

Non-economic loss (general damages)

Aggravated damages

Exemplary damages



Part 2(f) – Offers of Settlement

Why use settlement offers?

Cost savings and costs protection

Encourage a party to realistically assess their case

Types of settlement offers

Calderbank offer – ‘informal’ offer

Offer of Compromise – ‘formal’ offer pursuant to the Court Rules

Negotiated agreement – e.g. at a mediation or settlement conference



Part 2(f) – Offers of Settlement

Calderbank offer

‘Without prejudice save as to costs’

Elements of a Calderbank offer

Reference to *Calderbank v Calderbank* [1975] 3 All ER 333

Clear and unambiguous

Inclusive/exclusive of costs

Genuine offer to compromise

Reasonable time given for acceptance

Consequences of rejecting a Calderbank offer

Potential adverse costs consequences if rejection of the offer was ‘unreasonable’



Part 2(f) – Offers of Settlement

Offer of Compromise

Formal offer to settle made in accordance with Order 26 of the court rules

Consequences of rejecting an Offer of Compromise

Adverse costs consequences – see Order 26.08 of the court rules



Part 2(f) – Offers of Settlement

	Calderbank Offers	Offers of Compromise
Before proceedings are commenced	Yes	No
Time open for acceptance	Reasonable period	At least 14 days
Formalities	Does not require compliance with court rules	Compliance with court rules is required
Withdrawal	Can be withdrawn during the period for acceptance	Must not be withdrawn while open for acceptance without leave of the Court
Cost orders	No presumption in favour of indemnity costs – costs left in the Court's discretion	Presumption in favour of favourable costs order if other party rejects offer
Reasoning	To obtain a cost benefit, a Calderbank offer usually sets out the reasoning behind the offer and why it should be accepted	No requirement to include reasoning



Part 2(g) – Costs and Section 26 Certificates

Types of Costs

Professional costs vs disbursements

Levels of Cost Recovery

Party - party costs

Solicitor / client costs

Ordinary costs

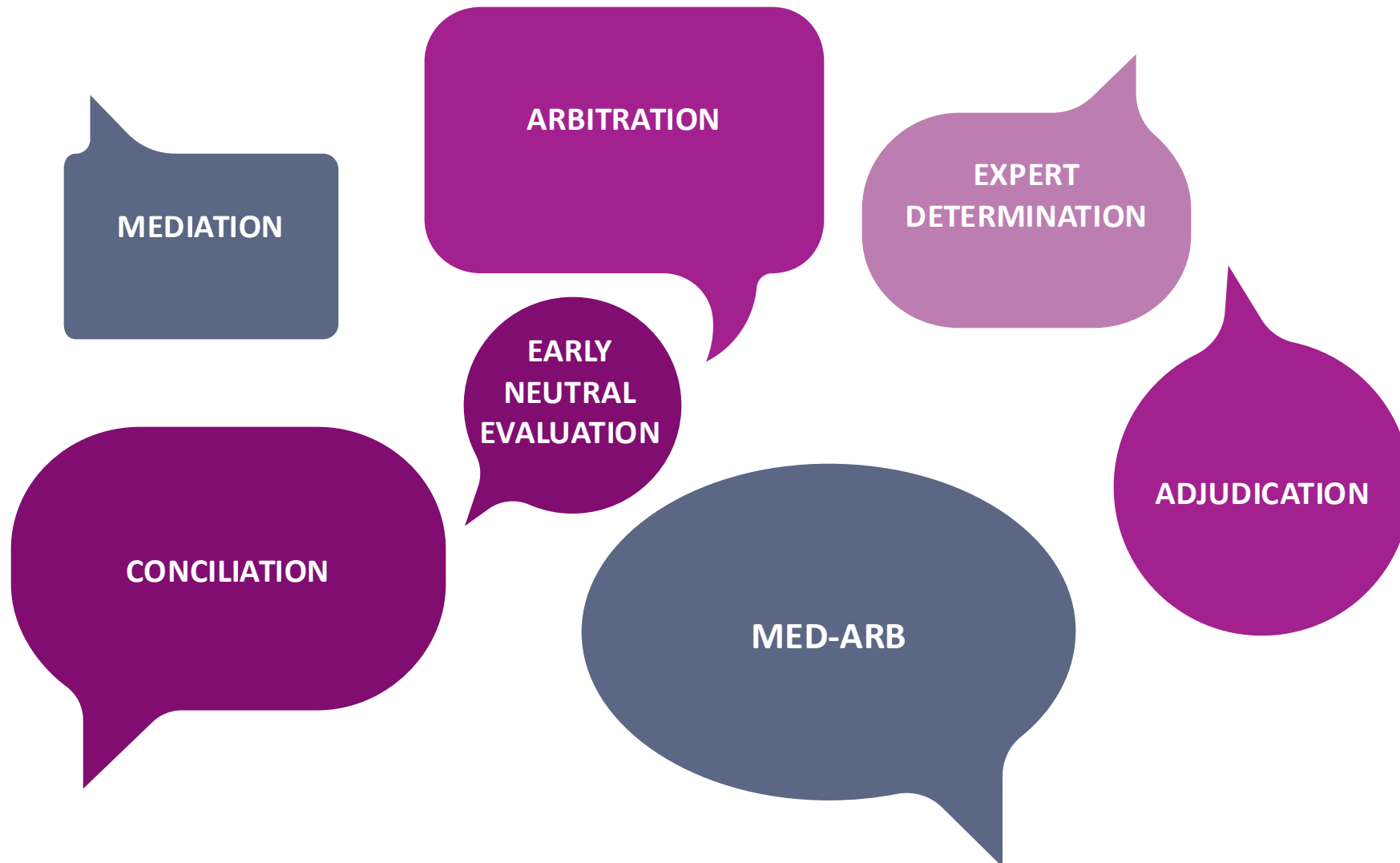
Indemnity Costs

Recovery of Costs

Section 26 Certificates



Part 2(h) – Alternatives to litigation



Carl Coaster v State of Victoria



Questions



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