

# **CHANGING THE CULTURE OF CIVIL LITIGATION**

## **A PRACTITIONER'S DUTIES UNDER THE CIVIL PROCEDURE ACT\***

**The Hon. Justice Clyde Croft\***  
**Supreme Court of Victoria**

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\* B Ec LLM (Monash), PhD (Cambridge), LFACICA, LFIAMA, JFAMINZ, FCIArb – Judge in charge of a Commercial List and the Arbitration List for the Commercial Court of the Supreme Court of Victoria.

## Introduction

The Victorian *Civil Procedure Act* 2010 (“the Act”) commenced operation on 1 January 2011, and has become an important event in the evolution in civil procedure that has been underway for some time, in Victoria, Australia and around the world. Intended as the foundation of a comprehensive overhaul of the civil justice system in Victoria, the Act was introduced to achieve significant reform to the way in which civil litigation is conducted in this State, and has since been described as “putting Victoria at the forefront of civil justice reform throughout the common law world.”<sup>1</sup>

At the heart of the Act lies its overarching purpose to “facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.”<sup>2</sup> In articulating an ideal that is to be used to guide judicial determination on a wide range of aspects of civil litigation - in particular over the conduct of parties to litigation - the Act marks a significant change in the approach to the resolution of civil disputes; first, by setting overall objectives; and secondly, by giving the court specific powers to enforce these objectives.

While the courts have always held the inherent power to “supervise the conduct of those appearing ..., and to visit with penalties any conduct of a lawyer which is of such a nature of as to defeat justice in the very cause in which he is engaged professionally”<sup>3</sup>, the Act now gives to judges clear legislative assistance to manage cases proactively in a manner that will promote the overarching purpose, as well as broad powers to impose sanctions on any party to litigation who fails to fulfil their obligations under the Act. In doing so, “the Act does not merely reaffirm the existing powers of the court but provides a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck.”<sup>4</sup>

In providing these case management guidelines - as well as the sanctions to enforce them - the Act sets out a clear restatement and clarification of the existing standard of conduct

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<sup>1</sup> LexisNexis Butterworths, *Civil Procedure: Victoria*, vol 2 (at Service 273) [C 1.01.0]

<sup>2</sup> *Civil Procedure Act* 2010, section 7(1)

<sup>3</sup> Ipp J, ‘*Lawyers’ Duties to the Court*’ (1998) 114 *Law Quarterly Review* 63, 63

<sup>4</sup> *Yara Australia Pty Ltd v Oswal; Carson & ors v Oswal; ANZ Banking Group Limited v Oswal; Apache Fertilisers v Oswal* [2013] VSCA 337 :(collectively referred to as the “*Oswal Proceedings*”), para 22

within the civil justice system for both parties and practitioners.<sup>5</sup> While the primary objective of the Act is to change the culture of litigation, rather than to punish behaviour, the sections of the Act that govern the power of the court to impose sanctions for contraventions of the overarching obligations have been described as including provisions broader than those in any other jurisdiction in Australia.<sup>6</sup> By providing these powerful statements regarding the values that are to govern civil proceedings, together with sanctions for breach, the Act has fundamentally altered the manner in which practitioners must conduct themselves within the Victorian system of civil litigation.

### **The traditional role of the parties and practitioners**

Lord Brougham, counsel for Queen Caroline in the great litigation of the early nineteenth century, once offered this justification for unrestrained zeal on the part of lawyers when discussing the duties that one owes when conducting themselves in the course of litigation:<sup>7</sup>

“An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.”

While this approach may not have maintained the support of a large a section of the legal profession for too long, Lord Brougham’s comments do identify an approach that nearly two hundred years later was still being identified as being problematic within the culture of the civil legal system, and in particular the adversarial system that is the hallmark of civil litigation in common law countries.

The Australian Law Reform Commission (ALRC), in its review of the adversarial system within Australia in the late 1990’s,<sup>8</sup> identified a number of the relative strengths and weaknesses that have traditionally been put forward whenever debate as to the merits of the

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<sup>5</sup> Explanatory Memorandum, *Civil Procedure Bill* 2010 (Vic), 6

<sup>6</sup> *Oswal Proceedings*, para 17

<sup>7</sup> *Proceedings in the House of Lords: Trial of Queen Caroline* (Duncan Stevenson & Co., 1820 ed), vol 2, p 7 referred to in Ipp J, ‘*Lawyers’ Duties to the Court*’ (1998) 114 *Law Quarterly Review* 63, 83

<sup>8</sup> Australian Law Reform Commission, *Managing justice: A review of the federal civil justice system*, ALRC 89 (“ALRC Review”)

adversarial system has occurred. The ALRC highlighted the benefits of judicial impartiality inherent in the adversarial system, and the manner in which this factor lends itself to the fundamental common law goal “that justice should not only be done, but should manifestly be seen to be done.”<sup>9</sup>

On the other side of the fence the ALRC found that some of the disadvantages included the tactical manoeuvring and obscured focus that can result from the combative nature of the adversarial system.<sup>10</sup> These aspects of less-than-savoury conduct by participants was similarly identified in the Victorian Law Reform Commission’s Report into civil justice reform within Victoria,<sup>11</sup> which stated that, anecdotally, there were persistent complaints about conduct issues relating to:<sup>12</sup>

- adversarial conduct which may exacerbate the dispute and contribute to the partisan attitudes and practices of lawyers, the parties and witnesses, particularly expert witnesses
- a lack of cooperation and disclosure, particularly at an early stage of proceedings
- the use of procedural tactics, including to delay proceedings, where it is perceived to be in a litigant’s interest; and
- incurring unnecessary or disproportionate legal and other costs.

The issue of proportionality with respect to the costs that practitioners charge for the services they provide is one that was discussed at length in both the reviews conducted by the ALRC and the VLRC. It might be some consolation to observe that this issue is not one that afflicts only those legal systems with a common law tradition. The German Proverb, “He who goes to the law for a sheep loses his cow” was no doubt coined by a disgruntled former client of a lawyer who charged a little more than he should have for services rendered, or perhaps failed to conduct litigation in an efficient and focussed manner. Unfortunately we are still seeing both the sheep and the cow lost all too frequently in our courts.

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<sup>9</sup> *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259

<sup>10</sup> *ALRC Review*, p. 104

<sup>11</sup> Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) (“VLRC Review”)

<sup>12</sup> *VLRC Review*, p 153

More recently the issue of proportionality has been the subject of what should be seen as a landmark decision of the Victorian Court of Appeal in four related proceedings referred to, collectively, as the *Oswal Proceedings*. In the *Oswal Proceedings*, the Court of Appeal, after handing down judgment on an appeal from a security for costs application, sought submissions from the parties on the question whether unnecessary or disproportionate legal costs had been incurred in breach of the overarching obligations set out in the Act. After noting that “as the enforcement of the overarching obligations under the Act has been so little traversed, there is presently little to guide judicial officers as to the extent of the Court’s powers and the means by which parties or their legal representatives can be penalised for any contravention”<sup>13</sup> – the Court of Appeal handed down a further judgment on this issue in a decision that will have far-reaching consequences for practitioners and the way in which they conduct themselves in civil litigation. The *Oswal Proceedings* will be considered in greater detail a little later

A further concern has been the fact that the adversarial system by its very nature has traditionally seen responsibility for the control of litigation placed almost solely in the hands of the litigants and their legal advisors, with the court being there “simply to provide a level playing field and to referee whatever game the parties choose to play upon it.”<sup>14</sup> This use of sporting analogy when describing the role of the court in years past has often been a favourite of English Judges, with Templeton LJ noting with disapproval that there was once a time where “litigation was a game which litigants and their advisers were at liberty to play at their own pace and that the only duty of a judge was to decide a proportion of those cases which survived to the last round.”<sup>15</sup>

Whilst these colourful analogies paint a perhaps less than flattering picture of the combative nature in which litigants and their lawyers have conducted proceedings before the courts, they do serve to illustrate the essential role that lawyers have always played in seeking the attainment of justice under the adversarial system - even if by allowing such leeway for practitioners to conduct proceedings as they see fit the courts may have inadvertently given

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<sup>13</sup> *Oswal Proceedings*, para 5

<sup>14</sup> *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946; [2005] EWCA Civ 75 at [54]

<sup>15</sup> *Towli v Fourth River Property Co: The Times* referred to in Ian Scott, ‘Caseflow Management in the Trial Court’ in Adrian Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure: Essays on ‘Access to Justice’* (1995) 1.

weight to the idea that the one great principle of the English Law was to make business for itself.<sup>16</sup>

The critical role of lawyers in civil litigation is not, however, to be underestimated. As Justice David Ipp, (as he then was), observed:<sup>17</sup>

“The power of the judge to find the truth is dependent upon the ability and desire of the parties’ lawyers to lay all the relevant facts before the court. Zeal and efficiency alone, however, do not ensure the doing of justice. The just operation of the legal system depends upon lawyers acting honestly and ethically, and not deliberately delaying or lengthening the proceedings or employing obstructionist tactics. The underlying purpose of the lawyers’ duties to the court is to protect the administration of justice by empowering the court to enforce appropriate behaviour by lawyers so as to achieve this end.”

### Changing the culture

It has become clear that in order to change the way in which litigation is conducted more active judicial intervention is required. So we have seen more active judicial case management gathering strength in recent times. This development and appreciation of the need for this intervention has not been limited to Law Reform Commission enquiries and reports. It is now to be seen in changes in court practices and procedures – such as those applied by the Commercial Court of the Supreme Court of Victoria with its intensively managed lists.

In *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd & ors*,<sup>18</sup> Redlich JA and Beach AJA (as he then was) discussed the changing nature of civil litigation and the manner in which such change – together with changes in community attitudes and expectations – has necessitated a reconsideration of the importance given to some of the duties that a practitioner owes the Court. Their Honours said:<sup>19</sup>

“There is a significant public interest in the timely resolution of disputes and the most efficient utilisation of scarce court resources. We doubt whether the

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<sup>16</sup> Dickens, C. *Bleak House*, London, United Kingdom. Bradbury and Evans, 1853. p 484

<sup>17</sup> Ipp J, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 64

<sup>18</sup> *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd & ors* (2009) 25 VR 189

<sup>19</sup> *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd & ors* (2009) 25 VR 189 at [15]

legal representatives of the applicants, as officers of the Court, gave any sufficient consideration in preparing or presenting their case as to how they might best assist the Court in the use of its limited resources. Because of the complexity and increased length of litigation in this age, the obligation which rest upon legal practitioners to give the courts such assistance has become increasingly important. Practitioners must ensure that the course chosen in the interests of the client is compatible with this overarching duty. It is a responsibility which should be at the forefront of every practitioner's considerations throughout the pre-trial and trial process. Without such assistance from the legal profession, the courts are unlikely to succeed in their endeavour to administer justice in a timely and efficient manner."

The importance of ensuring that proceedings are conducted in a timely and efficient manner was emphasised by the High Court of Australia in *Aon Risk Services v Australian National University*.<sup>20</sup> In *Aon*, the Court heard an appeal from the Court of Appeal of the Supreme Court of the Australian Capital Territory, where it was said that case management considerations, including the availability of court resources, were not irrelevant, but that the paramount consideration was that justice between the parties had been done.<sup>21</sup>

Chief Justice French, in handing down a judgment separate from the plurality, provided a detailed discussion of the changing nature of litigation in this country. Particular consideration was given to the way in which this change has both articulated and emphasised the duties that a practitioner has to use court resources in a proper manner as well as increased the importance that the courts place on strong case management principles. His Honour said:<sup>22</sup>

"The Judicature Act Rules and their Australian offspring did not in terms make reference to the public interest in the expeditious dispatch of the business of the courts. The way in which proceedings progress has been left to the parties. This may be seen as an aspect of the adversarial system which is a dominant part of the common law inheritance of Judicature Act procedure.<sup>23</sup> In this respect, however, the adversarial system has been qualified by changing practices in the courts directed to the reduction of costs and delay and the realisation that the courts are concerned not only with justice between the parties, which remains their priority, but also with the public interest in the proper and efficient use of public resources."

The ACT Rules, like their precursors, confer the discretion to give leave to amend and impose the duty to make amendments for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings. The discretion is exercised in the context of the common law adversarial system as qualified by

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<sup>20</sup> *Aon Risk Services v Australian National University* (2009) 239 CLR 175

<sup>21</sup> *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-218

<sup>22</sup> *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 188-189

<sup>23</sup> Jolowicz, *On Civil Procedure* (2000), pp 27-28

changing practice. But that is not a system which today permits disregard of undue delay. Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation. These are matters which, even under the Australian versions of the *Judicature Act* system, unaffected by the sequelae of the civil procedure reforms of 1998 in the United Kingdom, are to be regarded as both relevant and mandatory considerations in the exercise of the discretion conferred by rules such as r 502."

His Honour went on to consider a number of other decisions in which the principles of case management were at the forefront of the judges' minds:<sup>24</sup>

"Recognition of the public interest in the administration of civil justice procedures in Australia and the United Kingdom pre-dates the Woolf Report and its attendant reforms. In *Dawson v Deputy Commissioner of Taxation*,<sup>25</sup> King CJ acknowledged the responsibility of judges to ensure, "so far as possible and subject to overriding considerations of justice", that the limited resources which the State commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice. In a late amendment case considered by the House of Lords in 1987,<sup>26</sup> there was a marked departure from the approach of Bowen LJ in *Cropper v Smith*. Lord Griffiths required that judges considering amendments weigh in the balance:<sup>27</sup>

"the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently".

The same indulgence could not be shown towards the negligent conduct of litigation as might have been possible in a "more leisured age".<sup>28</sup> That approach was followed by Sheppard J in a revenue case heard in the Federal Court.<sup>29</sup> And in the New South Wales Court of Appeal in *GSA Industries*, Samuels JA said that:<sup>30</sup>

"the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe."

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<sup>24</sup> *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 189-190

<sup>25</sup> *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364 at 366

<sup>26</sup> *Ketteman v Hansel Properties Ltd* [1987] AC 189

<sup>27</sup> *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220

<sup>28</sup> See *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716 per Samuels JA

<sup>29</sup> *Federal Commissioner of Taxation v Brambles Holdings Ltd* (1991) 28 FCR 451 at 455-456

<sup>30</sup> *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 at 716



In a separate judgment, the plurality similarly emphasised the need to recognise the importance of case management principles. In laying down these principles the High Court refused to adhere to its approach to these issues in *Queensland v J L Holdings Pty Ltd*.<sup>31</sup> stating that:

“An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases.<sup>32</sup> On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.”

The High Court's decision in *Aon* was not the first time that the Court's decision in *J L Holdings* had received criticism for the way in which that decision had focused too heavily on the individual rights of the litigants at the expense of some of the wider duties parties to litigation owe to the courts and to the public. Finkelstein J expressed this concern in *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd*:<sup>33</sup>

“The case has, in my view, unfairly hamstrung courts. Almost every day a defaulting party seeks the court's indulgence to extend time, amend documents or obtain some other allowance (often not for the first, second or third time) and successfully relies on *J L Holdings* to obtain relief. It is time that this approach is revisited, especially where the case involves significant commercial litigation. One of the primary objectives of a commercial court is to bring the litigants' dispute on for trial as soon as can be reasonably and fairly done. If, in some instances, the preparation of the case if not perfect so be it. A case that is reasonable well prepared is just as likely to be decided correctly as a perfectly prepared case.”

Thus, in *Aon*, the High Court reemphasised that it is not sufficient to pursue just procedural outcomes merely by reference to the interests of the parties to the particular proceeding. The effects that a procedural decision will have on other litigants and on the public's interest in the efficient use of the Court's resources must also be taken into account.

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<sup>31</sup> *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146

<sup>32</sup> See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Imbree v McNeilly* (2008) 236 CLR 510 at 526 [45] per Gummow, Hayne and Kiefel JJ.

<sup>33</sup> *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FC 1623

The notion that parties to a proceeding are not entitled to consume an unlimited amount of public resources in pursuit of their own interests seems eminently sensible and reasonable.<sup>34</sup> It might be thought to be curious that this has not been the prevailing sentiment at the highest appellate levels for some time. Nevertheless, other jurisdictions have experienced the same phenomenon. In his reflection on the changes in civil litigation in England since the reform of the *English Civil Procedure Rules 1998* (the “Woolf reforms”<sup>35</sup>), Professor Zuckerman lamented that the benefits that were hoped for in 1998 have not materialised. He suggested that this is because of the primacy that the courts have continued to place on the rights of parties to pursue their own interests at the expense of other litigants and the public.<sup>36</sup>

Clearly, the reluctance to accept fully the pre-eminent importance of case management powers is borne out of a principled, but perhaps overzealous, adherence to the belief that a procedural decision should never be allowed to impede the vindication of a substantive right. In Australia, until *Aon*, this belief has arguably, as in England, held too much sway at the highest appellate levels. As the procedural history of *Aon* demonstrated, it has often been used to justify delay and inefficiency on the part of a litigant – at the expense of other litigants, courts, and the public. The High Court stated explicitly – and emphasised – that this is no longer acceptable. The plurality recognised “that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but also to other litigants”.<sup>37</sup> As we shall see, a number of recent decisions in this State have now firmly entrenched these principles in Victoria’s culture of civil litigation.

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<sup>34</sup> A.A.S. Zuckerman, “Reform in the Shadow of Lawyers’ Interests” in A.A.S. Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure – Essays on ‘Access to Justice’* (Clarendon Press, 1995) 61, 73-76.

<sup>35</sup> Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

<sup>36</sup> Adrian Zuckerman, “Litigation Management under the CPR: A Poorly-used Management Infrastructure” in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 102.

<sup>37</sup> *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217.

## The Role of the Act in Changing the Culture

With this increased emphasis on case management, the modern judicial task “requires skills and imposes burdens that historically formed no part of the judicial role.”<sup>38</sup> While the court’s inherent powers have been mentioned - and were prevalent in much of the preceding judicial comments - the powerful role that legislation can play in changing cultural habits outside of these inherent powers should not be underestimated. Writing extra-judicially, Chief Justice Black said:<sup>39</sup>

“[L]egislation imposing positive duties upon litigants and practitioners, will help to change attitudes and, within constitutionally permissible limits, will confirm that judges do have the power they need to require parties to cooperate to bring about the just resolution of disputes as quickly, inexpensively and efficiently as possible.”

The introduction of the Act has provided this impetus to effect a widespread cultural shift across the legal profession in order to both improve the efficiency of the Court, as well as to maintain a public confidence in the legal system. The Explanatory Memorandum which accompanied the Act identified the two main ways in which the primary objective of changing the culture of litigation was to be achieved. First, the changes implemented through the Act seek to create a culture in which litigants are encouraged to resolve their cases without going to court, and where litigation is seen as a measure of last resort. The second aspect focuses on the building of a culture within the court system that encourages litigants and, perhaps even more importantly, their lawyers to use “reasonable endeavours to achieve early resolution of cases by agreement, using appropriate dispute resolution processes where appropriate or to narrow the issues in dispute, except where the interests of justice require access to the court, or where the dispute is of such a nature that only judicial determination is appropriate.”<sup>40</sup>

In respect of these overarching obligations, the Act largely adopted the recommendations of the *VLRC Review*. This report was commissioned to identify the overall objectives and principles of the civil justice system that should guide and inform the rules of civil

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<sup>38</sup> The Hon. Ronald Sackville AO, “The future of case management in litigation”, (2009) 18 *Journal of Judicial Administration* 211, 217

<sup>39</sup> Chief Justice Black (as his Honour then was), “The role of the judge in attacking endemic delays: Some lessons from Fast Track” (2009) 19 *Journal of Judicial Administration* 88, 92-2

<sup>40</sup> Explanatory Memorandum, *Civil Procedure Bill* 2010 (Vic), 1

procedure, having regard to the aims of the Attorney-General's Justice Statement: *New Directions for the Victorian Justice System 2004-2014*,<sup>41</sup> as well as to identify the key factors that influence the operation of the civil justice system; including those factors that influence the timeliness, cost and complexity of litigation.<sup>42</sup> The VLRC Report was itself influenced by Lord Woolf's review of the civil justice system in England and Wales,<sup>43</sup> in which he concluded that an unacceptable situation had arisen out of "unmanaged adversarial procedure."<sup>44</sup>

In providing his *Interim Report* Lord Woolf identified the cause of high costs within the civil justice system as being a product of the "uncontrolled nature of the litigation process." His Lordship said:<sup>45</sup>

"Without effective judicial control ... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply."

The introduction of this Act has clarified the objectives of and principles to be applied in the civil justice system – and annunciated obligations that must be to the fore of the minds of all practitioners as they engage in civil litigation here in Victoria. Clearly the effect of the Act will be felt more and more broadly as the peril of disregarding these obligations is realized more extensively - by practitioners and by parties (or potential parties).

### **The Nature of the Obligations**

Part 2.3 of the Act outlines the overarching obligations. For the purposes of this paper, a number of them will be considered briefly here, before focusing specifically on s 24 – the obligation to ensure costs are reasonable and proportionate – and s 25, which establishes an obligation to minimise delay.

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<sup>41</sup> Attorney-General's Justice Statement: *New Directions for the Victorian Justice System 2004-2014*, Department of Justice, Victoria, 2004.

<sup>42</sup> *VLRC Review*, page 51

<sup>43</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).

<sup>44</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), 13.

<sup>45</sup> Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), 13.

Section 16 of the Act provides that any 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”,<sup>46</sup> while s 17 obliges a person to whom the overarching obligations apply to act honestly at all times in relation to a civil proceeding. These obligations can be seen as part of what Justice Ipp (as he then was) has referred to as “the growing trend of courts to require cases to be determined in accordance with the objective ‘truth’ rather than on evidence adduced solely for reasons of perceived tactical advantage.”<sup>47</sup> In support of his contention, Justice Ipp (as he then was) pointed to a comment made by the former Chief Justice of Australia, Sir Anthony Mason, who said when discussing the changing role of the courts:<sup>48</sup>

“I have left to last two developments which have already had or may have an impact on the role of the judge. The first is the rediscovery of the fundamental truth – or truism – that the courts are concerned with the administration of justice. There was a time when it was thought that the courts administered the law as distinct from justice. That is not the position today. And judicial concern with the ideal of justice is at bottom one of the reasons why the courts have refined some of the principles of substantive law as well as procedural law.”

Section 18 provides that a person to whom the overarching obligations apply must not make a claim, or make a response to a claim, that is frivolous, vexatious, an abuse of process, or does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis. In tasking practitioners with the obligation to ensure a client’s claim has real legitimacy and is not merely a tactic, the Act seeks to ensure that the administration of justice is not subverted or distorted by dishonest, obstructive or inefficient practices.<sup>49</sup>

Sections 19 and 20 share a common thread in that they oblige a party to act only in manner that will help resolve the dispute. Section 19 obliges a party not take any steps in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding. Section 20 requires a person to whom the

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<sup>46</sup> *Civil Procedure Act* 2010, section 16.

<sup>47</sup> Ipp J, ‘*Lawyers’ Duties to the Court*’ (1998) 114 *Law Quarterly Review* 63, 69

<sup>48</sup> Sir Anthony Mason, “The Role of the Courts at the Turn of the Century” (1993) *J.J.A.* 156 at 165 referred to in Ipp J, ‘*Lawyers’ Duties to the Court*’ (1998) 114 *Law Quarterly Review* 63, 69

<sup>49</sup> Ipp J, ‘*Lawyers’ Duties to the Court*’ (1998) 114 *Law Quarterly Review* 6365

overarching obligations apply to cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding. These sections are indicative of the clear intention of Parliament to effect change in the conduct of civil litigation – moving away from conduct of a merely adversarial, combative nature towards conduct centred on parties working together constructively to resolve the dispute efficiently and expeditiously.

Section 21 shares its philosophical basis with s 17 – and to a lesser extent, s 20 – by requiring parties not to engage in conduct which is misleading or deceptive, or that is likely to mislead to deceive.

Sections 22 and 23 are drafted in such a manner as to allow a degree of overlap. Section 22 provides that a person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement, including, if appropriate, by appropriate dispute resolution. If the dispute cannot be resolved, s 23 provides a less onerous obligation to use reasonable endeavours to at least resolve by agreement any issues in dispute which can be resolved in that way, and narrow the scope of the remaining issues in dispute. Each of these two sections contains the caveat that a party is absolved from fulfilling these obligations if it is not in the interests of justice to uphold them, or if the dispute is of such a nature that only judicial determination is appropriate.

For legal practitioners, if any inconsistency arises between the overarching obligations and the duties and obligations to a client the overarching obligations prevail.<sup>50</sup> The overarching obligations must be complied with despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.<sup>51</sup> For example, if a party makes an application for a purpose in contravention of the overarching obligations and a solicitor complies with the instructions, the solicitor may also be in contravention of the obligations.

I now turn to consider in greater detail a recent decision of the Court of Appeal which marks a definitive point in the way in which the overarching obligations under the Act are to be approached and enforced.

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<sup>50</sup> *Civil Procedure Act 2010*, section 13(3)(a)

<sup>51</sup> *Civil Procedure Act 2010*, section 13(3)(b)

## The Oswal Proceedings

On 27 November of last year, the statutory regime and the obligations imposed by the Act were considered in detail at the appellate level for the first time when the Court of Appeal handed down judgment in the *Oswal Proceedings*. Following the publication of the Court's reasons for refusing an application for leave to appeal orders from a Trial Division Judge which had set aside the order of an Associate Judge for security for costs, the Court then "requested the parties to address the question of whether in the conduct of the leave application there had been a breach by any party of their overarching obligation under the *Civil Procedure Act 2010* to use reasonable endeavours to ensure that the costs incurred in the proceeding were reasonable and proportionate to the complexity and importance of the issues and the sums in dispute."<sup>52</sup>

Collectively, across the four related proceedings, six separate parties were involved – two of whom were represented by the same counsel at the application for leave to appeal. The application for leave to appeal was heard in one day. Five senior counsel, six junior counsel and five firms of solicitors were present at the hearing representing the parties. In addition to the notices of appeal and the parties' written cases, the parties between them filed six lever arch folders of material.

In handing down its judgment, the Court addressed two factual questions in focusing on the issue of proportionality. First, whether there was any over representation of parties by counsel and, secondly, whether the material produced at the hearing of the application for leave to appeal was unnecessary or excessive. After considering the overarching purpose of the Act and the court's obligation to give effect to this purpose, the Court turned its attention to the duty of the parties to ensure costs are reasonable and proportionate.

Before turning to that issue, however, it is important to highlight the significance of the Court of Appeal requesting the parties to make submissions as to whether they have breached their obligations under the Act.

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<sup>52</sup> *Oswal Proceedings*, para 1

## *The role of the Judge in enforcing the practitioner's obligation*

The provisions of the Act – as well as providing a concise restatement of the duties that parties to litigation owe to the courts and to each other – give judges the means to exert greater control over the conduct of the parties and their legal representatives. In discussing the nature of the role of judges in common law – as opposed to civil law – jurisdictions, Denning LJ once said:<sup>53</sup>

“In the system of trial we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happened, we believe in some foreign countries.”

As has been recognised by Professor Zuckerman, “[t]he presence of a management infrastructure is not sufficient to deliver the hoped for result. These can be delivered only by managers willing to use the management tools to best effect.”<sup>54</sup> The paramount importance that both the Parliament and the highest Court in this country have placed on adhering to strong case management principles to ensure the achievement of the just, efficient, timely and cost-effective resolution of the real issues in dispute, means that these comments of Denning LJ can no longer apply to judges in this country.

In this context the Court of Appeal observed that:

“[S]anctions imposed for a breach of any overarching provisions have been a rarity at first instance. When no party invites the court to determine whether there has been a breach of the Act, there may be a judicial disinclination to embark upon such an own-motion inquiry for fear that inquiry as to a potential breach may be time consuming and may require the introduction of material that was not before the court as part of the proceeding. Such fears cannot relieve judges of their responsibilities.”<sup>55</sup>

These comments by the Court of Appeal in regard to the proactive role that judges must take in enforcing the provisions of the Act may be seen as a watershed moment for both practitioners and the judiciary alike. For judges, it is a helpful reaffirmation of their

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<sup>53</sup> *Jones v National Coal Board* [1957] 2 QB 55, 63 referred to in *ALRC Review* note 175, p 102

<sup>54</sup> Adrian Zuckerman, “Litigation Management under the CPR: A Poorly-used Management Infrastructure” in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 94

<sup>55</sup> *Oswal Proceedings*, para 27.



important responsibilities, and the critical importance of the overarching obligations for all involved in civil litigation. For practitioners, it is a gentle warning of the even greater role judges must play in closely managing civil proceedings – using all the means at their disposal – to ensure that the overarching purpose of the Act is achieved.

### *The obligation to ensure costs are reasonable and proportionate*

Section 24 provides that a person to whom the overarching obligations apply must use reasonable endeavours to ensure that the legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate, having regard to the complexity or importance of the issues in dispute, as well as to the amount that is in dispute.

In discussing the nature of the test to be applied for the purposes of the provision, the Court of Appeal said:<sup>56</sup>

“13 Section 24 adopts a flexible test. There is plainly no costs matrix or formula that can be applied in determining whether the parties have met their obligations. Rather, the court must weigh the legal costs expended against the complexity and importance of the issues and the amount in dispute, in order to determine whether the parties used reasonable endeavours to ensure those costs were proportionate.

14 Each party and their solicitor and counsel have an obligation to comply with the overarching obligation. Whether any of them have breached that overarching obligation is to be determined by an objective evaluation of their conduct having regard to the issues and the amount in dispute in the proceeding. The legal practitioners’ duty is non-delegable. The obligation will override their duty to their client where the discharge of that duty would be inconsistent with the overarching obligation. The legal practitioner will not be relieved of this overarching responsibility because of the instructions of their client.

15 Legal practitioners, whether solicitor or counsel, involved in the preparation of pleadings, affidavits or other materials that are to be used in the proceeding or who provide advice as to such matters, have individual responsibilities to comply with the overarching obligations. Both solicitor and counsel also have an overarching responsibility with respect to the extent and level of their client’s representation. Each must ensure that, having regard to the issues, the extent and level proposed is reasonable and proportionate. Advice or instructions given or received by legal practitioners, and instructions given by the client may inform but will not be determinative of the question whether, viewed objectively, there has been a breach of the obligation.”

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<sup>56</sup> *Oswal Proceedings*, para 13

### *The test of proportionality*

In discussing whether there was in fact any unnecessary representation of the parties in the *Oswal Proceedings*, the Court of Appeal said that while the scope of s 24 is not rigidly defined, there is plainly an obligation within the meaning of that section to ensure that the parties are not over-represented. In this respect the Court considered the second reading speech to the Act, which specifically refers to the practice of unnecessary representation as being a procedural issue that needs redress:<sup>57</sup>

“The Attorney-General, in discussing s 24 said:

“In relation to the duty to ensure costs are reasonable and proportionate, an example of a possible breach may be the practice of briefing two barristers (senior counsel and junior counsel) where the complexity of the case does not warrant it. I note that the obligation is worded so that resources are not unreasonably constrained for cases that might in themselves be for a small amount, but that have significant precedent or public interest value.”<sup>58</sup>

The Court of Appeal emphasised that the decision as to the level and extent of representation that is necessary for a party in a proceeding is not one that can be left solely in the hands of the parties. Even where it may be the case that the party has provided informed instructions to their legal practitioners that they wish for a particular counsel to be briefed, it is incumbent upon those legal practitioners to consider whether, having regard to the overarching obligations contained in s 24 of the Act, the level of representation would contravene the Act. The Court of Appeal recognised that “there will be proceedings in which the complexity or importance of the issues and the amount in dispute will not justify the engagement of counsel of particular seniority or will not justify the engagement of more than one counsel.”<sup>59</sup>

In this instance, the Court did say that there was in fact an “unusual degree of legal representation.”<sup>60</sup> Despite this, it was not held that the level of representation was such as to constitute a breach of the obligations under s 24 of the Act. Having regard to the

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<sup>57</sup> *Oswal Proceedings*, para 34

<sup>58</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2609 (Attorney-General Rob Hulls) referred to in *Oswal Proceedings*, para 34

<sup>59</sup> *Oswal Proceedings*, para 36

<sup>60</sup> *Oswal Proceedings*, para 39

explanations proffered by the parties as to this unusual level of representation, as well as the importance and complexity of the issues, the likely costs of the proceedings, the manner in which the hearing was conducted and the fact that the oral submissions of lead senior counsel succinctly narrowed the focus of the application, the Court was satisfied that there was no breach of the overarching obligation in regard to the level of representation

It was, however, a different story in relation to the large volume of material that was provided to the Court. In the six lever arch folders produced for the hearing, there was over 2700 pages of material, including “affidavit material from the parties’ solicitors [that] contained a variety of largely extraneous materials, included old statements of claim, swathes of email correspondence, materials from related proceedings in Western Australia, and transcripts from related hearings in the Supreme Court of Victoria. Much of this material was either peripheral to the application or entirely unnecessary.”<sup>61</sup> The Court noted that, while the Act is designed to protect litigants from incurring excessive costs, the provisions were also intended to protect against the inappropriate use of the courts as a public resource. The Court said:<sup>62</sup>

“overly voluminous application material strains the administrative resources of the Court and the time of judges themselves. Where a large volume of material is provided to the court that is unnecessary and excessive, there will be a prima facie case that the overriding obligation has been breached.”

The Court said that the application books contained substantial amounts of duplicated materials, while the proceedings in Western Australia were not mentioned at all in the applicants’ submissions. One affidavit ran for 198 pages, while a letter containing a copy of an amended writ and statement of claim ran for 170 pages and duplicated the copy already provided in the application book.<sup>63</sup> A further affidavit ran for 492 pages, which included superfluous material, including 20 pages of Reserve Bank data on the daily price of the \$US.

Under these circumstances, the Court found that:<sup>64</sup>

“ 49 The application books contained voluminous unnecessary material which increased the costs for all parties and the burden on the court. Very little of it

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<sup>61</sup> *Oswal Proceedings*, para 40

<sup>62</sup> *Oswal Proceedings*, para 40

<sup>63</sup> *Oswal Proceedings*, para 44

<sup>64</sup> *Oswal Proceedings*, para 49, 51

was the subject of any reference in oral argument. In all, significantly more than half of the material in the application books was entirely unnecessary to the questions raised by the notice of appeal.

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51 ... Such expenditure as is incurred on an interlocutory application must be proportionate to the proceeding in question. We are satisfied on the balance of probabilities that the overarching obligation under s 24 to ensure that costs were reasonable and proportionate has been breached by the filing of excessive material.”

In producing this type of material to the Court, the practitioners displayed little regard for their obligations under the Act. The fact that the material filed was in some instances duplicated would lend itself to the conclusion that the parties themselves were not even sure about the content of the material they were putting before the Court. As Redlich JA and Beach AJA had said in *A Team Diamond*, the obligation which rests upon legal practitioners to give such assistance has become increasingly important. Cobbling together as much material as possible to fill up an impressive array of lever arch folders to present to the court – especially where much of this material is duplicated or irrelevant – was shown by the Court to be a clear breach of the Act.

The Court’s comment that “where a large volume of material is provided to a court that is *unnecessary and excessive*<sup>65</sup> there will be a prima facie case that the overriding obligation has been breached” make it clear that the volume of material – or the degree of legal representation, as the case may be – does not of itself mean that the overarching obligation in s 24 has been breached. The decisive factor which determines whether the obligation has been breached is found in the plain language of the section itself – what is ‘reasonable and proportionate.’ There may be instances where practitioners file a similar amount of material as that which was filed in the application hearing in the *Oswal Proceedings*, and no breach of the overarching obligations will have occurred, or be suggested. Similarly, the courtroom may be filled with senior counsel – “standing room only” at the bar table – and yet, again, no obligation will be breached. It all depends upon whether, given the complexity or importance of the issues in dispute, as well as the amount in dispute, the costs that have been charged are, in all the

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<sup>65</sup> [emphasis added],

circumstances, considered reasonable and proportionate. The duty lies squarely with the practitioners to ensure that whatever action is taken, it is reasonable and proportionate.

### *The power to impose sanctions under the Act*

As was observed previously, to date, sanctions imposed for a breach of any overarching obligation have been a rarity at first instance. The Court of Appeal explained this in part as being due to “a false perception that these provisions and the overarching obligations do not affect any material change to the Rules and the inherent jurisdiction of the Court.”<sup>66</sup>

Part 2.4 of the Act empowers the Court powers to impose sanctions for contraventions of the overarching obligations, and provides a broad disciplinary power. Section 28 provides that in exercising *any* power in relation to a civil proceeding, a court may take into account *any* contravention of the overarching obligations. Under sub-section 28(2), the Court may take into account *any* contravention of the overarching obligations in exercising its discretion to costs. These provisions could not be couched in more definitive language. Thus, the Court of Appeal said when discussing this section:<sup>67</sup>

“In our view, the enactment of s 29 together with s 28(2) imbues the Court with broad disciplinary powers that may be reflected in the costs orders that are made. The Court is given a powerful mechanism to exert greater control over the conduct of the parties and their legal representatives, and thus over the process of civil litigation and the use of its own limited resources.”

Section 29 empowers the Court to “make any order it considers appropriate in the interests of justice” – and then provides a variety of options in this respect. These specific provisions are inclusive rather than exclusive provisions so do not in any way limit the general power conferred by s 29. Sub-section 29(2) again emphasises the all-embracing nature of the general power; providing that an order under these provisions may be made on the application of any party to the proceeding or where that party, has in the opinion of the court, a sufficient interest in the proceeding, or on the court’s own motion.

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<sup>66</sup> *Oswal Proceedings*, para 25

<sup>67</sup> *Oswal Proceedings*, para 21

The Court of Appeal considered the *Civil Procedure Act 2005 (NSW)* then observed that s 29 provides powers broader than any other jurisdiction in Australia to sanction legal practitioners and parties who fail to meet their obligations. The NSW Act has a similar overriding purpose to “facilitate the just, quick and cheap resolution of the real issues in the proceeding”,<sup>68</sup> and while it provides more specific obligations such as effective case management and alternative dispute resolution procedures, the Court said that the NSW provisions remain more “aspirational than obligatory”. Similarly, the Court found that s 29 of the Act provides the Court with broader and more flexible powers than under the *Supreme Court (General Civil Procedure) Rules 2005* (the Rules), or even under its inherent power. While the powers under r 63.23(1) of the Rules are not punitive or disciplinary in nature, but rather act as a form of compensation, enabling reimbursement of a party’s costs incurred because of the default of the solicitor,<sup>69</sup> the powers under s 29 place the sword firmly in the hands of the Court. In discussing the breadth of s 29, the Court said:<sup>70</sup>

“The Court’s powers under s 29 include the power to sanction legal practitioners and parties for a contravention of their obligations as the heading to Part 2.4 indicates. In our view, these powers are intended to make all those involved in the conduct of litigation – parties and practitioners – accountable for the just, efficient, timely and cost effective resolution of disputes.”

The Court of Appeal then went on to articulate a number of the forms that a costs order may take when a breach of the obligations have occurred. In doing so, the Court of Appeal has signalled that, moving forward, the powers under Act will be utilised to their full extent by the courts, to ensure that the overarching purpose of the Act - to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute - is achieved.

The Court said:<sup>71</sup>

“Parliament has given the courts flexible means of distributing the cost burden upon and across those who fail to comply with their overarching obligations. A sanction which redistributes that burden may have the effect of compensating a party. It may take the form of a costs orders against a practitioner, an order that requires the practitioner to share the burden of a costs order made against their client or an order which deprives the practitioner of costs to which they would otherwise be entitled. The Act is

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<sup>68</sup> *Civil Procedure Act 2005 (NSW)*, section 56(1)

<sup>69</sup> *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 229

<sup>70</sup> *Oswal Proceedings*, para 20

<sup>71</sup> *Oswal Proceedings*, para 20

clearly designed to influence the culture of litigation through the imposition of sanctions on those who do not observe their obligations.”

The Court of Appeal ordered that the applicant pay the respondent’s cost of the application and then, in a decision that will send a clear message to the legal profession, ordered that the applicant’s solicitor indemnify the applicant for 50% of the respondent’s costs incurred as a consequence of the unnecessary or excessive content of the applications books.

### **Obligation to minimise delay**

The decision in the *Oswal Proceedings* has sent a clear and powerful message that courts must take a strong stance against practitioners who exercise little concern for their obligations to ensure costs are reasonable and proportionate under s 24 of the Act. In doing so, courts can ensure more efficient civil litigation practice becomes embedded in the civil litigation culture, both freeing up court resources while maintaining public confidence in the system

Section 25 of the Act provides that for the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations must use reasonable endeavours in connection with the civil proceeding to act promptly and to minimise delay.

A number of recent cases in the Supreme Court have indicated that - along with ensuring the obligations under s 24 are closely followed - the Court will apply the provisions of s 25 rigorously to ensure that the overarching purpose of the Act is achieved. Given the close relation that drawn-out proceedings and excessive time wasting can have to the reasonableness of the costs that a party may incur, it is likely that these two sections of the Act will, in a sense, develop as different sides of the same coin. Indeed, the experience of the Commercial Court has shown that focusing on the prompt resolution of disputes - as opposed to allowing parties and practitioners to meander along at their own pace with seemingly little desire to reaching resolution - benefits all parties involved; including the Court and, by extension, the general public who have an interest in an efficient litigation system as potential parties seeking access to the scarce resources of the system, and as taxpayers. Not only are the costs to the parties to the dispute minimised, but the considerable strain on public resources that over-litigated proceedings cause can similarly be minimised.

*Kuek v Deflan*<sup>72</sup> dealt with an appeal from an order of an Associate Judge setting aside a Notice of Application to Review an Order of a Costs Judge that the plaintiff - an experienced litigation solicitor and the principal of a law firm<sup>73</sup> who was appealing a costs decision awarded against him - had filed, pursuant to the Supreme Court Rules, out of time. The relevant rule provided that a notice of this type must be filed and served within fourteen days of the making of the order. Here the orders were made on 29 September 2011, and an authenticated copy was emailed to the plaintiff that same day. The plaintiff's affidavit evidence stated that he received the orders by ordinary post on 3 October 2011, making no mention of the emailed orders in his affidavit.

The plaintiff submitted that on 14 October 2011, an unnamed person from his office, who was never identified posted three copies of the notice to the Prothonotary's office, and that this was sufficient to meet the filing requirements under the rules, although there was no record of these copies ever being received by the Prothonotary. No further action was taken by any party to the proceeding until the plaintiff wrote to the Prothonotary's office on 14 February 2012, seeking clarification as to the status of the proceeding. Upon receiving no reply, the plaintiff waited until 16 March 2012 before following up this earlier enquiry with a phone call. The Court found that - despite the plaintiff's claim that the notices were mailed by ordinary post on 14 October 11 no filing of the notice was effected until 20 March 2012, when the Prothonotary eventually received the notices by post.

Dismissing the appeal, Kyrou J discussed the fine line that sometimes operates in causing delay. His Honour said:<sup>74</sup>

“A party that purports to post a document to the Court for filing on the day after the document was required to be filed under the Rules does not act promptly and does not minimise delay.”

During the course of the hearing, counsel for the plaintiff made a number of dismissive submissions about the operation of the Act, contending that it contains “generalities and rhetoric and that its fundamental intent...is that justice be done.” His Honour responded in

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<sup>72</sup> *Kuek v Deflan* [2012] VSC 571

<sup>73</sup> *Kuek v Deflan* [2012] VSC 571, [2]

<sup>74</sup> *Kuek v Deflan* [2012] VSC 571,[73]



a manner that should be seen as a strong indication to all practitioners of how seriously the Court will look at any disregard that may be shown for the obligations imposed the Act:<sup>75</sup>

“78 ...The Act does not contain generalities and rhetoric. Nor does it deal with abstract concepts of justice. The Act imposes specific statutory obligations on the Court, the parties to civil litigation, the lawyers acting in civil litigation and other persons involved in litigation such as expert witnesses. It seeks to ensure that civil litigation is conducted in a just efficient, timely and cost effective manner and it gives the Court wide powers to make orders limiting the rights and remedies that are otherwise available to a party if that party breaches its obligations under the Act.

79 The Act must be taken seriously by litigants and their lawyers. In an appropriate case, the Court is entitled to – and will – say a party seeking to enforce its rights in a manner that is antithetical to the overarching purpose and to that party’s overarching obligations that ‘enough is enough’, and will act to curtail those rights in the interests of the administration of justice.

The Court found that the plaintiff’s conduct constituted a breach of s 25 of the Act and that, given this, it was then appropriate to take that breach into account in deciding whether to grant the plaintiff an extension. Due to this breach of s 25, no extension was granted and the appeal was dismissed. Clearly, the Court will hold both practitioners and parties responsible for any delays they cause to the just, efficient, timely and cost-effective resolution of proceedings – and the consequences of their delay may sound in serious sanctions.

### **Amendments to the Act**

The *Civil Procedure Amendment Act* 2012 has served to strengthen further the already broad empowering provision under the 2010 Act. The explanatory memorandum for the *Civil Procedure Amendment Bill* 2012 notes that the reason behind its introduction has been to give additional powers and discretions for the courts in relation to costs disclosure and expert evidence:<sup>76</sup>

“The Civil Procedure Amendment Bill 2012 amends the Civil Procedure Act 2010 to introduce specific powers and discretions for the courts in relation to costs and expert evidence, to amend and create greater flexibility in the overarching obligations and proper basis certification requirements and to make other technical amendments.

The Bill aims to reduce costs and delays for persons involved in civil

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<sup>75</sup> *Kuek v Deflan* [2012] VSC 571,[78]-[79]

<sup>76</sup> Explanatory Memorandum, *Civil Procedure Amendment Bill* 2012, 1

litigation in Victoria, and improve the effectiveness of the civil justice system. The Bill builds on the foundation established by the Civil Procedure Act 2010 in seeking to give judges and magistrates a clear legislative mandate to proactively manage cases in a manner that will promote the just, efficient, timely and cost-effective resolution of the real issues in dispute in a civil proceeding.”

Part 2 of the *Civil Procedure Amendment Act* 2012 gives the Court power to require costs disclosure to a lawyer's own client, and expands the type of costs orders which courts are able to make:<sup>77</sup>

“Disclosure of litigation costs by a lawyer to his or her client is critical for informed decision-making. The Bill gives the courts a discretionary power to order that a lawyer make costs disclosure to the lawyer's own client. The order may be made at any stage of the proceeding. This will allow the courts, in appropriate cases, to increase the parties' access to information in relation to actual and estimated costs and disbursements incurred prior to trial, thereby encouraging more informed decision-making and the settlement of appropriate cases.”

The Act also clarifies and strengthens the courts' discretionary power to make other costs orders aside from the usual order that the losing party pay the winning party's costs. The Act provides that the court may make any costs order that it considers appropriate to further the overarching purpose. Specific powers include ordering costs as a lump sum figure instead of taxed costs, ordering a party to pay a proportion of costs or fixing or capping recoverable costs in advance. Such orders avoid or narrow the scope of a taxation of costs. The objective is to increase the use of other costs orders in appropriate cases, thereby reducing the complexity, time and cost associated with taxation. Orders may be made in relation to any aspect of a proceeding, including, but not limited to, any interlocutory proceeding.

## **Conclusion**

In discussing the case management powers provided to the court under the *Civil Procedure Act* 2005 (NSW) in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*,<sup>78</sup> the High Court said recently:<sup>79</sup>

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<sup>77</sup> Explanatory Memorandum, *Civil Procedure Amendment Bill* 2012, 1

<sup>78</sup> *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46

<sup>79</sup> *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46 at [56]

“The evident intention and the expectation of the CPA is that the court use these broad powers to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose.”

As was observed by the Court of Appeal in the *Oswal Proceedings*, the powers given to courts in this State under the *Civil Procedure Act 2010* go even further. The Court’s judgment in that case has set the framework for courts across this jurisdiction to fully and unhesitatingly utilise the powers under the Act to ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute. It can no longer be the case that practitioners can hold the mistaken belief that the obligations under the Act are merely ‘aspirational’ rather than obligatory, nor should a practitioner feel that the provisions are generalities that operate as merely a gentle touch in the direction of the ‘pursuit of justice.’ The fundamental position that the overarching obligations now hold in the Victorian civil litigation system has been clearly established, as has the responsibility of the judiciary to ensure that the court gives effect to the overarching purpose of the Act whenever exercising any of its powers.

With this in mind, every practitioner must fully understand and appreciate the duties and obligations they have under this Act. By maintaining the primacy of these obligations within the culture of civil litigation within Victoria, practitioners, parties and the courts can continue to enhance this State’s reputation as being at the forefront of civil litigation reform throughout the common law world.

With the benefit of legislation such as this we will achieve a position where the proverbial German farmer may keep both his sheep and his cow – or at least not lose the cow.