Case management in the Commercial Court and under the Civil Procedure Act[*]

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SUPREME COURT OF VICTORIA

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Introduction

The introduction of the Victorian *Civil Procedure Act* 2010 ("the CPA") is an important step in the evolution in civil procedure that has been underway for some time, in Victoria, Australia. and around the world. The need for active case management of civil matters has already been recognised in changes in court practices and procedures – such as those applied by the Commercial Court of the Supreme Court of Victoria – and at common law. The High Court of Australia in *Aon Risk Services v Australian National University* said:[2]

> [111] 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*[3] 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.[4] 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.

In laying down these principles the High Court refused to adhere to its approach to these issues in *J L Holdings*, and returned to the position that was established previously in *Sali v SPC Ltd*.[5] In *Sali* it was recognised that:[6]

> What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

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

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[2] *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-218 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[3] *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.
[4] 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.
[5] (1993) 67 ALJR 841; 116 ALR 625**.**
[6] (1993) 67 ALJR 841 at 844; 116 ALR 625 at 629**,** quoted in *Aon* (2009) 239 CLR 175 at 190 per French CJ.

litigants and on the public's interest in the efficient use of the Court's resources must also be taken into account.

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.[7] 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"[8]), 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.[9]

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'.[10]

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[7] 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.

[8] Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

[9] 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.

[10] *Aon* (2009) 239 CLR 175 at 217.

Case management and the Commercial Court

The objective of the Commercial Court is, as stated in paragraph 2.1 of the *Green Book*,[11] to provide for the just and efficient determination of commercial disputes by the early identification of the substantial questions in controversy, and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular proceeding. A key aspect of the Commercial Court is that a judge is allocated to manage and hear each matter from the first directions to final determination at trial, if the matter makes it that far, which many of course do not.

The most important rules and procedures applicable to the Commercial Court are the *Supreme Court (General Civil Procedure Rules) 2005* and those set out in the *Green Book*.[12] It is in the context of the "Court Objective and Policies" of the Commercial Court that procedural issues are to be determined.[13] The *Green Book* contains detailed and specific provisions for the procedural steps of a Commercial Court proceeding – such as first direction**s,** further directions, case management conferences and other applications**.** Each provision is, however, subject to the overriding requirement to give effect to the Court Objective, which is not to be triumphed over by tactical applications and delays.

The details of the first and further directions hearings and case management conferencing is set out in detail in the *Green Book*.[14] A feature of the management process is the utilisation of appropriate dispute resolution techniques, particularly mediation, at times and in the manner thought most likely to be helpful by the Judge in charge of the List. The approach which has been applied by the Commercial Court to case management and appropriate dispute resolution is now very much reflected in the provisions of the CPA.

A characteristic of practice in the Commercial Court is its flexibility. Directions are tailored and may vary to suit the management appropriate to specific disputes, and to

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[11] Practice Note 1 of 2010 – Commercial Court
[12] See also the *Supreme Court Act 1986* (Vic) particularly s 29(2).
[13] See *Green Book,* Paragraph 2, pp. 3 and 4.
[14] See *Green Book,* Paragraph 7 (Case Management) and paragraph 8 (Directions Hearings).

reflect the views of the judges to whom cases have been allocated, to achieve the objective of providing for the just and efficient determination of commercial disputes. The Commercial Court seeks to ensure that the cost of any procedure adopted will be proportional to the issues and the amount at stake.[15] The Court does expect, and insists, that lawyers will cooperate creatively in this endeavour.

Cases other than corporations cases and arbitration cases will be managed, generally, according to the practice currently adopted and applied under the *Green Book* regime for commercial cases within the Commercial Court. Lawyers know that the following departures from the *Green Book* practice may be made:

(a) Group proceedings may be commenced in the Commercial Court;

(b) Pleadings may be dispensed with in an appropriate case;

(c) Witness statements may not be the norm and are not considered appropriate in some cases;

(d) Parties will be encouraged to present routine interlocutory applications to the Court for determination on the papers without hearing; and

(e) The Court may be ready to fix the costs awarded upon interlocutory applications to save the parties the cost and time of preparing a taxable bill.

The Commercial Court process gives parties ample opportunity to raise issues in dispute. From the first directions hearing parties are invited to inform the court of the issues in dispute. At further directions hearings the judge will be proactive in identifying the matters in dispute. Generally speaking, the matter will be ordered to mediation before a case management conference. Once the case management conference is reached the issues in dispute should be well defined. If the parties have

[15] See *Green Book*, paragraph 2.4.2.

fulfilled their obligations under the *Green Book*[16] this will almost certainly be the case. The draft list of issues as provided in the case management bundle provides the basis for identifying precisely what issues are in dispute having regard to the pleadings.[17] Once the case management conference is complete, usually with a trial date set down, the parties will, in almost all circumstances, be held to the issues already raised.

The Role of the Commercial Court Judge

In managing commercial disputes each Commercial Court judge is striving to achieve the Court Objective. In pursuing this objective, the work of the Commercial Court exemplifies the fact that the modern judicial task 'requires skills and imposes burdens that historically formed no part of the judicial role.'[18]

The *Green Book* provides the framework in which the Commercial Court judge will operate. But, as has been recognised by Professor Zuckerman, '[t]he presence of a management infrastructure is not sufficient to deliver the hoped for results. These can be delivered only by managers willing to use the management tools to best effect.'[19] Thus the task of the Commercial Court judge inherently requires an understanding of the unique circumstances of a case from the commencement of proceedings. Having surveyed the issues, the challenge for the judge then becomes one of 'striking the right balance' as to the deployment of procedures that will deliver a just resolution in the most efficient way. This requires frank acknowledgement that, at times "demands which arise in managing a dispute are frequently irreconcilable and push or pull in different directions."[20] It also requires an appreciation of the fact that speed does not

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[16] *Green Book*, paragraph 2.4 where the parties undertake to approach their case co-operatively to achieve the "Court Objective", to assist the Court in this respect and "not to use the resources of the Court and of the parties needlessly or in a manner that is out of proportion to the matters in issues" (see particularly, paragraphs 2.4.4, 2.4.5 and 2.4.6, p. 3).

[17] See *Green Book*, paragraphs 7.10 (purpose of list of issues) and paragraph 7.13 (draft list settled in consultation with the judge).

[18] The Hon. Ronald Sackville AO, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 211, 217.

[19] 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.

[20] The Hon. Justice Pagone, "The Role of the Modern Commercial Court", a paper presented to the Supreme Court Law Conference on 12 November 2009, 12.

necessarily equate with efficiency[21] and that 'there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.'[22] Notwithstanding these issues and challenges, *Aon* has confirmed that the objective of the Commercial Court is the kind of objective that judges must work hard to achieve.

The Civil Procedure Act 2010 (Vic)

The CPA provisions have significant parallels with legislation that endorses case management objectives and judicial application of case management principles in other Australian jurisdictions.[23] The CPA is another step towards achieving the objectives that the judges in *Aon* had in mind and which the Commercial Court aims to achieve. As has been recognised in extra-judicial writing by Justice Sackville:[24]

> There is a school of thought that specific legislative intervention in support of case management is unnecessary, since the rules or the inherent powers of the court confer ample authority on the judges to manage litigation in a manner that minimises delays and ensures that costs are proportionate to the matters in dispute. This view underestimates the significance of legislation.

Indeed, as has been recognised by Chief Justice Black (as he then was): [25]

> Any legislative indication of policy must stand as 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 … Legislation 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.

Against this background some of the key features of the CPA should be noted.

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[21] The Hon. Justice Byrne, "Promoting the efficient, thorough and ethical resolution of commercial disputes: A judicial perspective" a paper presented at the LexisNexis Commercial Litigation Conference, Melbourne on 20 April 2005, p 2.
[22] The Hon. Michael Black AC, "The role of the judge in attacking endemic delays: Some lessons from Fast Track" (2009) 19 *Journal of Judicial Administration* 88, 91.
[23] Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2607, Mr Hulls (Attorney-General).
[24] The Hon. Ronald Sackville AO, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 211, 217.
[25] The Hon. Michael Black AC, "The role of the judge in attacking endemic delays: Some lessons from Fast Track" (2009) 19 *Journal of Judicial Administration* 88, 92-3.

An 'overarching purpose' for the courts

In the words used by the then Attorney General in his Second Reading speech, the Bill seeks to introduce: [26]

> [A] uniform statutory statement to define the overarching purpose of the courts, which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute … The courts will be required to give effect to the overarching purpose when exercising powers or interpreting their powers.

The "Overarching Purpose" is set out in section 7:

> (1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.
>
> (2) Without limiting how the overarching purpose is achieved, it may be achieved by—
>
> (a) the determination of the proceeding by the court;
>
> (b) agreement between the parties;
>
> (c) any appropriate dispute resolution process—
>
> (i) agreed to by the parties; or
>
> (ii) ordered by the court.

The Court is to exercise its powers to achieve the "Overarching Purpose".[27] The Court's powers to further the overarching purpose are set out in section 9:

> (1) In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects—
>
> (a) the just determination of the civil proceeding;
>
> (b) the public interest in the early settlement of disputes by agreement between parties;
>
> (c) the efficient conduct of the business of the court;
>
> (d) the efficient use of judicial and administrative resources;
>
> (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—
>
> (i) the fair and just determination of the real issues in dispute; and

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[26] Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2608, Mr Hulls (Attorney-General).
[27] *Civil Procedure Act 2010*, sections 8 and 9.

(ii) the preparation of the case for trial;

(f) the timely determination of the civil proceeding;

(g) dealing with a civil proceeding in a manner proportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute.

Obligations applying to parties, lawyers, and litigation funders

The CPA sets out overriding obligations that apply not only to lawyers, but to all participants who have the power to influence the course of civil litigation.

The paramount duty to the court is "to further the administration of justice in relation to any civil proceeding".[28] Other obligations include the obligation to act honestly (s 17), make sure claims have a proper basis (s 18), steps in relation to a civil proceeding if necessary to facilitate the resolution or determination of the dispute (s 19), to cooperate (s 20), not mislead or deceive (s 21), to use reasonable endeavours to resolve the dispute (s 22), narrow issues (s 23), ensure costs are reasonable and proportionate (s 24), minimise delay (s 25) and disclose existence of documents (s 26).

Section 34 of the CPA prescribes a broad general obligation upon 'persons involved in a civil dispute' to 'take reasonable steps … to resolve the dispute by agreement or clarify and narrow the issues in dispute'.

Pre-litigation requirements

Chapter 3 of the CPA made provision for pre-litigation requirements, which would operate with respect to each person involved in a civil dispute. According to s 34(1) of the Act, before civil proceedings commence in any 'civil dispute' (that is, "any dispute which may result in the commencement of a civil proceeding": s 3 of the Act),

> "[e]ach person involved in a civil dispute must take reasonable steps, having regard to the person's situation and the nature of the dispute—
>
> (a) to resolve the dispute by agreement; or

[28] *Civil Procedure Act 2010*, section 16.

(b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced. …"

Sanctions for failure to do so were set out in Part 3.2 of the Act.

However, in February of 2011, the *Civil Procedure and Legal Profession Amendment Bill* 2011, which is primarily aimed at removing all pre-litigation requirements for civil disputes from the Act, was introduced into the Legislative Assembly. By 4 March 2011, the Bill had passed through both the Legislative Assembly and had reached the second reading stage in the Legislative Council. The rationale for removing these pre-litigation requirements was set out in the second reading speech of the Attorney General, the Honourable Robert Clark MP:[29]

> "It is common sense and good practice for parties to attempt to resolve their dispute without resorting to litigation if there is a reasonable prospect of success in such an attempt.
>
> However, the government's view, and the view of many practitioners, is that to seek to compel parties to do so through these heavy-handed provisions [the pre-litigation requirements, referred to as "PLRs"] will simply add to the complexity, expense and delay of bringing legal proceedings, because of the need to comply with these mandatory requirements, whether or not they are likely to be useful in any particular case.
>
> In many instances, the PLRs will allow dishonest parties to postpone and frustrate proceedings.
>
> These problems arise because the PLRs apply to all proceedings unless a specified exception is applicable, whereas in practice the extent, if any, to which it makes sense for prelitigation processes to be undertaken will depend on the facts of the particular case.
>
> Of particular concern is the potential for the bill to create unreasonable and costly barriers to recovering debts through the courts, especially for small to medium-sized

[29] The second reading speech of the Attorney General, the Honourable Robert Clark MP on the *Civil Procedure and Legal Profession Amendment Bill 2011* (Vic) (10 February 2011).

> businesses. Where a debtor simply will not pay up or even reply to repeated requests for payment, creditors should be entitled to go to court to recover debts without the need for compliance with prelitigation requirements that will almost certainly be fruitless."

As a result, there will shortly no longer be any pre-litigation requirements that apply to civil disputes under the CPA.

Obligations on parties and lawyers to certify adherence on commencement of civil proceedings

Part 4.1 of the CPA includes a series of provisions that require certifications that parties have read and understood the overarching obligations (to be provided by parties in their pleadings), and that allegations made have a proper basis (to be certified by lawyers in their supporting affidavits).

Case Management under the CPA

All the directions, orders and judgments that a judge makes before the final determination of a proceeding will have a case management aspect to them. This is how judges should approach the idea of case management. Consequently, the entire CPA is relevant to the issue of case management – especially the overarching purpose. More specifically the provisions for "Case Management" are, however, contained in Part 4.2. Encouragement to the courts to actively manage proceedings is found in section 47:

> (1) Without limiting any other power of a court, for the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the court may give any direction or make any order it considers appropriate, including any directions given or orders made -
>
> (a) in the interests of the administration of justice; or
>
> (b) in the public interest
>
> (2) A direction given or an order made under subsection (1) may include, but is not limited to, imposing any reasonable limits, restrictions or conditions in respect of –
>
> (a) the management and conduct of any aspect of a civil proceeding; or
>
> (b) the conduct of the proceeding.

Section 47 then goes on to make provision for a variety of case management powers with reference to specific types of directions a court may make in the course of exercising these case management powers. In so doing reference is made to the type of case management tools that are regularly used in the Commercial Court. Many of these tools are already regularly used: such as giving directions to ensure that proceedings are conducted efficiently (including fixing timetables); early identification of issues; early disposition of issues; encouraging the parties to cooperate and mediate; and using technology including electronic court books and video conferencing. In accordance with s 47(3)(g) judges should consider "whether the likely benefits of taking a particular step in a civil proceeding justify the cost of taking it." Other, less used tools, include those in s 47(3)(f):

> (f) limiting the time for the hearing or any other part of a civil proceeding, including, but not limited to—
>
> (i) limiting the number of witnesses at the hearing;
>
> (ii) limiting the time for the examination or cross-examination of any witness;
>
> (iii) limiting the issues or matters that may be the subject of examination or crossexamination;

There need to be very strong reasons to justify limiting the amount of relevant evidence that a party can adduce. If a party is prejudiced by being limited in the evidence it can adduce, the efficiency gains may be lost if there is a successful appeal on the basis of the application of this limitation.

Section 48 sets out further frequently used pre-trial stage case management powers. These powers include the ordering of timetables or timelines; encouraging or ordering appropriate dispute resolution; conducting case management conferences to "consider the most cost effective and efficient means of bringing the civil proceeding to trial and of conducting the civil proceeding"; and defining issues by pleadings, lists of issues or memoranda.

Section 49 further deals with the courts' powers to order and direct trial procedure. These powers include directing the order of addresses and evidence; limiting the time the parties have to present their cases and also the evidence to be adduced; limiting the documents to be prepared; directing that summaries or schedules of documents be prepared; deciding whether evidence should be giving by witness statement or

partially by witness statement; and the proportions in which parties are to bear any costs. As noted above, relevant evidence should only be limited by the court when there are very strong reasons for doing so, and only when parties will not be prejudiced.

Section 50 specifically empowers the courts to order a legal practitioner acting for a party to estimate hearing length and associated costs and disbursements – and to provide a memorandum of these estimates in writing. Section 51 sets out the powers of the court if a party breaches any orders or directions under Part 4.2 – this includes making costs orders and the striking out of claims.

The various powers under Part 4.2 are not necessarily new. Nevertheless, the presence of general and specific empowering provisions contained in this Part is further encouragement to the courts to manage litigation in line with the overarching purpose. All the powers provided for in Part 4.2 are tools that judges in the Commercial Court use on a regular basis. From 1 January 2010, these explicit case management powers will be available for use in all civil proceedings, not just those in the Commercial Court. Nevertheless, parties (or at least the plaintiff) may choose to bring their case in a managed list like that provided by the Commercial Court. It is therefore expected that those parties will understand the advantages of, and consequently seek, expedited and efficient management of the proceeding. Of course, this is not necessarily true of all other proceedings in the Court – as there are often tactical reasons which suit one party to maintain high levels of complexity in the proceedings and to attempt to achieve delay.

From 1 January 2010, on the basis of the overriding objective, the courts are directed to manage all litigation in a just, efficient, timely and cost effective manner. Additionally, on the basis of the overriding obligations, the parties and their representatives must do their best to conduct proceedings expeditiously and to narrow the issues. No doubt, courts will face dilemmas when presented with the choice of using extra resources and time to expedite a proceeding in which the parties are not doing their utmost to progress. It is difficult to balance such competing interests. However, under the new Act, litigants and their representatives should be aware that once a dispute reaches a court they should be prepared to proceed efficiently and expeditiously.

Overall, it is expected that more civil litigation will be managed in a way similar to that provided by the Commercial Court. Of course, it is impossible to set out with any degree of specificity how proceedings are going to be managed in all civil proceedings. Management practices vary greatly between Commercial Court cases and will also need to be flexible when applied across the common law and commercial and equity divisions.

The objectives of the CPA will not be realised unless case management is pursued actively by the courts. Any benefits provided by the certification requirements and ongoing obligations will be lost if the parties are not disciplined by the flexible and proportionate use of case management. It is through case management that the courts will have the most important impact on the efficient and expedient disposal of civil proceedings – consistently with the administration of justice in a manner which has regard to all the interests involved, private and community.

Finally, it should be noted that the CPA does not limit the powers of a court with respect to case management arising out of court rules or any practice note or practice direction – such as the *Green Book*.[30]

[30] *Civil Procedure Act 2010*, section 53.