



The management of costs in Australian litigation – reforms and trends*

The Hon. Justice Clyde Croft¹

A paper delivered to the Judges of the Supreme Court of Singapore.

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¹ B Ec LLM (Monash), PhD (Cambridge), LFACICA, LFIAMA, JFAMINZ, FCIArb.

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Introduction

Recent reforms in Victoria, and across Australia, are part of the continuing evolution in civil procedure that has been underway for some time in Victoria, Australia and around the world. Particular attention has been given to the management of commercial disputes. One reason for this attention is, of course, the increasing costs of resolving commercial disputes. The regulation of legal costs is receiving some attention in Australia's legal profession reforms. A draft Legal Profession National Law has been agreed between most of Australia's States and Territories and it is expected that some of the jurisdictions, including Victoria, will introduce the legislation into Parliament this year. More recently the Australian Law Reform Commission has considered and reported on discovery and means which may be adopted to limit the process, hence its cost.

In relation to the courts, the view has been taken that if disputes are managed efficiently the costs of litigation should decrease. The Civil Procedure Act 2010 (Vic) and procedures such as those in the Commercial Court of the Supreme Court of Victoria are aimed at judicial management of proceedings to this end. This may not directly tackle the issue of the charging of legal fees or the benefits of hourly billing versus the alternatives. However, in my view, the courts are not well placed to deal with these issues, at least not directly. This is not to say that these issues are not critically important. They need to be tackled but the legal market is very complex and any major overhaul of the regulation of legal fees needs to be undertaken on the basis of very extensive research, economic and otherwise, as to current practices, possible changes, the mechanisms for change and costs and benefits. Well intentioned reform on the basis of anecdotal evidence carries significant risks. The courts are, however, well positioned, especially with the backing of new legislation such as the Civil Procedure Act 2010 (Vic), to effect immediate improvements to the manner in which litigation is conducted, to manage the parties, to narrow issues and to start becoming more involved in the practical aspects of costs in litigation as they arise. This direct approach should, and does, decrease the overall time and cost associated with resolving disputes.

Costs under the proposed Legal Profession National Law

In Victoria, lawyers' responsibilities in relation to the charging of legal costs is regulated under the Legal Profession Act 2004 (Vic), which is the Act that regulates the profession. There are varying regimes in the other States and Territories. There is a

reform process underway to uniformly regulate the profession across the country. This has resulted in a proposed Legal Profession National Law. One of the most controversial aspects of the proposed bill is section 4.3.4:

“Legal costs must be fair and reasonable

(1) A law practice must, in charging legal costs, charge costs that are no more than fair and reasonable in all the circumstances and that in particular are:

- (a) proportionately and reasonably incurred; and
- (b) proportionate and reasonable in amount.

(2) In considering whether legal costs satisfy subsection (1), regard must be had to whether the legal costs reasonably reflect:

- (a) the level of skill, experience, specialisation and seniority of the lawyers concerned; and
- (b) the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest; and
- (c) the labour and responsibility involved; and
- (d) the circumstances in acting on the matter, including (for example) any or all of the following:
 - (i) the urgency of the matter;
 - (ii) the time spent on the matter;
 - (iii) the time when business was transacted in the matter;
 - (iv) the place where business was transacted in the matter;
 - (v) the number and importance of any documents involved; and
- (e) the quality of the work done; and
- (f) the retainer and the instructions (express or implied) given in the matter.

...

(4) A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if:

- (a) the provisions of Division 3 relating to costs disclosure have been complied with; and
- (b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.”

An article in the Australian Financial Review on 14 June 2011 said:²

² Samantha Bowers, “Lawyers push back on shake up” *Australian Financial Review* (14 June 2011), 1.

“The legal profession argues that the new provisions, designed to give individuals and small business more power over their legal fees and protect against nasty surprises in bills, would be too harsh because they are vague and subjective. They say the current requirement in most states to avoid “grossly excessive” costs is sufficient to protect consumers.”

Lawyers are particularly concerned as under the current Legal Profession Act 2004 (Vic) a referral to the Legal Services Commissioner is only made when the costs are grossly excessive. Under the new regime the costs only need to be not fair and reasonable. Most of the costs provisions of the current law and the proposed law do not apply to sophisticated clients such as public companies, subsidiaries of public companies and government authorities. Therefore their applicability to large commercial disputes is somewhat limited. It remains to be seen whether changes such as the “fair and reasonable” requirement will have a significant effect. These small changes and strengthening of disclosure requirements may have a positive impact, especially on infrequent users of legal services, but much more analysis is required before a true overhaul of legal billing, if required, can be achieved. This was highlighted by the Victorian Law Reform Commission’s Civil Justice Review Report which said:³

“There is clearly a need for more research and empirical data on legal costs. Information about court ordered disclosure of costs incurred (and estimated further costs) at the commencement of litigation, would be of considerable value, not only to the parties and to assist the court in the management of proceedings, but also to facilitate further research and reform.”

In the meantime, the costs of litigation are best targeted by increased management of cases by judges both in specialist lists and more generally.

Case Management

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 importance of case management was highlighted by the High Court of Australia in *Aon Risk Services v Australian National University* in relation to an application to amend a pleading:⁴

[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

³ Victorian Law Reform Commission, *Civil Justice Review Report*, Report No. 14 (2008), 691.

⁴ *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-218 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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*⁵ 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.⁶ 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*.⁷ In *Sali* it was recognised that:⁸

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.

As Heydon J noted in some detail in *Aon*, the procedural history of that case was not one of efficiency, though it was not in the same class as the Chancery proceedings in *Bleak House*. His Honour said:⁹

The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do

⁵ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

⁶ 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.

⁷ (1993) 67 ALJR 841; 116 ALR 625.

⁸ (1993) 67 ALJR 841 at 844; 116 ALR 625 at 629, quoted in *Aon* (2009) 239 CLR 175 at 190 per French CJ.

⁹ *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 229.

they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.

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.

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.¹⁰ 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"¹¹), 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.¹²

The statements found in the judgments in *Aon* were welcome recognition of the growing importance of active case management undertaken by judges. However, the High Court can only provide broad guidance to courts applying their own varied procedures to infinitely varied fact situations. It is for each court, working within its rules, to adopt its own case management principles. The Commercial Court of the Supreme Court of Victoria is aiming to be an exemplary model in this regard.

¹⁰ 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.

¹¹ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

¹² 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.

The Commercial Court of the Supreme Court of Victoria

Justice Heydon, in *Aon*, made specific reference to the important role that courts must play in ensuring the efficient disposition of commercial litigation. His Honour said:¹³

While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is commonly seen as especially desirable for commercial litigation... Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest ... Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

It is clear that the judiciary must be attuned to, and must provide for, the realities and needs of commerce.¹⁴ Lord Mansfield's development of commercial law in the latter part of the eighteenth century is a prime example of the ability of the common law to be very proactive in this respect.¹⁵

The objective of the Commercial Court is, as stated in paragraph 2.1 of the Green Book,¹⁶ to provide for the just and efficient determination of commercial disputes by the early identification of the substantial questions in controversy, and the flexible

¹³ *Aon* (2009) 239 CLR 175 at 223 to 224 per Heydon J.

¹⁴ The Hon. Justice Pagone, "The Role of the Modern Commercial Court", a paper presented to the Supreme Court Law Conference on 12 November 2009, 3.

¹⁵ J. M. Holden, *The History of Negotiable Instruments in English Law*, (University of London, The Athlone Press, 1955) 114:

A particularly important institution which he 'adapted and improved' was the special jury. Prior to his term of office, the use of this type of jury was unsystematised. He established it as a regular institution and went so far to gain the confidence of the experienced business men who sat as special jurors as to invite them to dine with him. It was largely as a result of Mansfield's special jury system that it was found possible 'to weld commercial usage into the main body of English law without the sacrifice of elasticity'. His practice was to incorporate customs into his judgments, and so establish them as binding rules for the future. If the practice on a particular subject was uncertain, then he would normally rely on the opinion of his special jurors. But once a point had been settled, it was, in his view, the judge's duty to adhere to it. [footnotes omitted]

¹⁶ Practice Note 1 of 2010 – Commercial Court

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.¹⁷ It is in the context of the “Court Objective and Policies” of the Commercial Court that procedural issues are to be determined.¹⁸ The Green Book contains detailed and specific provisions for the procedural steps of a Commercial Court proceeding – such as first directions, 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.¹⁹ 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 Civil Procedure Act 2010 (Vic).

The Commercial Court is not a court which is at all accommodating of time wasting, tactical, technical pleadings applications. It will not join in a “procedural orgy” the like of which have been only too prevalent in the courts for very many years in relation to the content and phraseology of pleadings and particulars. It is all the more a sad and unedifying spectacle, as we know from bitter experience, that these issues, which were often so hard-fought and at great expense, seldom mattered much, if at all, in the end as each party was really well aware of the case it had to meet. And, in any event, the importance of pleadings “battles” is further diminished when, at trial, evidence is led

¹⁷ See also the *Supreme Court Act 1986* (Vic) particularly s 29(2).

¹⁸ See *Green Book*, Paragraph 2, pp. 3 and 4.

¹⁹ See *Green Book*, Paragraph 7 (Case Management) and paragraph 8 (Directions Hearings).

that does not go to proving a material fact in the hard-fought for pleading.²⁰ In circumstances where the parties disregard their pleadings “and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest”.²¹

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 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.²² 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.

²⁰ For the circumstances in which this can occur see LexisNexis, *Civil Procedure: Victoria*, vol 1 (at service 225) [I 13.01.10].

²¹ *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517 per Isaacs and Rich JJ.

²² See *Green Book*, paragraph 2.4.2.

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 fulfilled their obligations under the Green Book²³ 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.²⁴ 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.

Parties are entitled to raise all matters of controversy in their dispute. The Commercial Court's procedures are very effective at identifying the issues. This often occurs at an early stage in the management of the case, and parties at this stage will frequently be given leave to amend their pleadings to reflect all matters actually in dispute. However, because the parties are given such a comprehensive opportunity to raise any issues in dispute, once pleadings are closed and the Case Management Conference²⁵ has been completed only in rare cases will a party be able to raise new issues.

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

²³ *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).

²⁴ See *Green Book*, paragraphs 7.10 (purpose of list of issues) and paragraph 7.13 (draft list settled in consultation with the judge).

²⁵ For further discussion of the importance of case management conferences see: The Hon. Justice Pagone, "The Role of the Modern Commercial Court", a paper presented to the Supreme Court Law Conference on 12 November 2009, 3 and The Hon. Justice Davies, "Issues in case management – The case management conference" a paper presented at the Commercial Court CPD and CLE on 25 February 2010.

exemplifies the fact that the modern judicial task ‘requires skills and imposes burdens that historically formed no part of the judicial role.’²⁶

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.’²⁷ 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.”²⁸ It also requires an appreciation of the fact that speed does not necessarily equate with efficiency²⁹ and that ‘there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.’³⁰

The Civil Procedure Act 2010 (Vic)

The Victorian *Civil Procedure Act 2010* (“the CPA”), which commenced operation on 1 January 2011, 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 CPA applies to all civil proceedings other than those excluded in section 4 of the Act. The CPA does not apply to VCAT proceedings.³¹ The CPA implements many of the recommendations made in the Victorian Law Reform Commission’s Civil Justice Review Report.³² 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

²⁶ The Hon. Ronald Sackville AO, “The future of case management in litigation”, (2009) 18 *Journal of Judicial Administration* 211, 217.

²⁷ Zuckerman, above n 20, 94.

²⁸ The Hon. Justice Pagone, above n 8, 12.

²⁹ 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.

³⁰ 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.

³¹ *Civil Procedure Act 2010*, s 4(3).

³² Victorian Law Reform Commission, *Civil Justice Review Report*, Report No. 14 (2008).

Court of the Supreme Court of Victoria – and at common law. Indeed, as has been recognised by Chief Justice Black (as he then was):³³

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 current Act should be noted.

An ‘overarching purpose’ for the courts

In the words of the Attorney General in his Second Reading speech, the CPA introduces:³⁴

[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.

³³ 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.

³⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2608, Mr Hulls (Attorney-General).

The Court is to exercise its powers to achieve the “Overarching Purpose”.³⁵ 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
 - (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.

The overarching purpose is similar to rule 1.14 of the Supreme Court (General Civil Procedure) Rules 2005 which states:

- (1) In exercising any power under these Rules the Court—
 - (a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;
 - (b) may give any direction or impose any term or condition it thinks fit.

...

The overall impact of the CPA will depend on its interpretation by the courts, both at trial and on appeal. Given its place in the overall scheme of the CPA, and the legislative intent surrounding the reform, it is hoped that the overarching purpose will support

³⁵ *Civil Procedure Act 2010*, sections 8 and 9.

more efficient practices than the comparable rules have in the past. The key to this is to have proportionality between the real issues in dispute and the amount of costs incurred by the litigants and the community. Given that litigation is the last resort for resolving disputes, it is reasonable that relatively simple disputes which are suited to appropriate dispute resolution processes and which incur less legal costs and take up less public resources, should be referred to these processes. It follows that practitioners, and courts, will be expected to give serious thought to the dispute resolution process suited to all or parts of a dispute – whether they be appropriate dispute resolution processes or litigation. Preliminary issues or questions may also arise in this context. This is the dispute resolution culture that the CPA is intended to create.

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. Consequently, judges and parties should have the CPA dispute resolution culture in mind. The entire CPA is relevant to the issue of case management – especially the overarching purpose – with the more specific provisions for “Case Management” 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. Sections

48 and 49 deal with the courts' powers to order and direct pre-trial and trial procedures. Section 50 sets out the power of the courts to order a legal practitioner acting for a party to estimate hearing length and associated costs and disbursements – and to provide this 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 striking out 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 2011, these explicit case management powers became 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 2011, on the basis of the overarching objective, the courts are directed to manage all litigation in a just, efficient, timely and cost effective manner. Additionally, on the basis of the overarching obligations, the parties and their representatives must do their best to conduct proceedings expeditiously and to narrow the issues. A court will face an interesting dilemma when faced with the choice of using extra resources and time to expedite a proceeding in which the parties are not doing their utmost to progress. Should the court expedite the matter so far as possible, or focus on other cases in which the parties are fulfilling their obligations? It is no doubt difficult to balance the competing interests. One way in which the problem may be avoided arises from the position that the parties will need to comply with the certification requirements of Part 4.1 of the CPA. This should mean that the issues have already been narrowed, and resolution of issues attempted before the courts first become involved in a dispute. Litigants and their representatives should be aware that once a dispute reaches a court they should be prepared to proceed efficiently and expeditiously.

Obligations applying to parties, lawyers, and litigation funders

The CPA sets out overarching obligations that apply to parties (including self represented litigants), legal practitioners and any person who provides financial or other assistance to a party and exercises control or influence over the conduct of the proceeding or a party. Some of the overarching obligations also apply to expert witnesses.

The paramount duty to the court is “to further the administration of justice in relation to any civil proceeding”.³⁶ Other obligations include the obligation to act honestly (s 17), make sure claims have a proper basis (s 18), take steps in relation to a civil proceeding if necessary to facilitate the resolution or determination of the dispute (s 19), cooperate with the parties and the court (s 20), not mislead or deceive (s 21), 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). Subsection 10(3) states that the obligations in sections 18, 19, 22 and 26 do not apply to expert witnesses.

For legal practitioners, if any inconsistency arises between the overarching obligations and the duties and obligations to a client the overarching obligations prevail.³⁷ 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.³⁸ 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.

Some of the overarching obligations applicable to the parties and other participants are similar to the duties already imposed on practitioners through the common law and professional conduct rules. However, the obligations placed on practitioners have also been widened from the duties to the court and other professional obligations to achieve the dispute resolution culture encouraged by the overarching purpose. Once proceedings are commenced, the CPA through the overarching obligations, encourages a dispute resolution culture that aims at proportionality between costs and

³⁶ *Civil Procedure Act* 2010, section 16.

³⁷ *Civil Procedure Act* 2010, section 13(3)(a)

³⁸ *Civil Procedure Act* 2010, section 13(3)(b)

the complexity of the dispute, narrowing of issues, responsible conduct in the litigation and the minimisation of delay.

It is important to note that the obligation to disclose critical documents to the other litigants continues from time the pre-litigation requirements apply. As noted above, this is in addition to any discovery obligations or processes.

The sanctions for contravening the overarching obligations are flexible and include the payment of costs or compensation. However, it cannot be assumed that courts will make such orders “on their own motion”. In the context of an adversarial trial system, which the CPA does not affect, it follows that litigants who believe other parties have not complied their obligations under the CPA will need to pursue such claims, at least in the first instance. If neither party wishes to have the litigation managed efficiently, it can be difficult for a judge to intervene unless the facts and circumstances are reasonably clear and in evidence before the court. Of course, in appropriate cases judges will intervene on their own motion, and are given specific statutory power to do so.³⁹

The new summary judgment regime

An important tool of case management is the ability to order summary judgment. The summary judgment provisions are found in Part 4.4 of the Civil Procedure Act:

“PART 4.4—SUMMARY JUDGMENT

60 References to defendant and plaintiff in this Part

In this Part, a reference—

(a) to a plaintiff includes a reference to a plaintiff by counterclaim; and

(b) to a defendant includes a reference to a defendant by counterclaim.

61 Plaintiff may apply for summary judgment in proceeding

A plaintiff in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a defendant's defence or part of that defence has no real prospect of success.

³⁹ *Civil Procedure Act* 2010, sections 29(2)(b), 38(4)(a), 39(2)(a) and s 63(2)(c).

62 Defendant may apply for summary judgment in proceeding

A defendant in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a plaintiff's claim or part of that claim has no real prospect of success.

63 Summary judgment if no real prospect of success

(1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.

(2) A court may give summary judgment in any civil proceeding under subsection (1)—

- (a) on the application of a plaintiff in a civil proceeding;
- (b) on the application of a defendant in a civil proceeding;
- (c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

64 Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

65 Interaction with rules of court

The powers of a court under this Part are in addition to, and do not derogate from, any powers a court has under rules of court in relation to summary disposal of any civil proceeding.”

[emphasis added]

The summary judgment provisions apply to plaintiffs, plaintiffs by counterclaim, defendants and defendants by counterclaim (section 60). There is no exclusion of the summary judgment provisions for claims involving libel, slander, malicious prosecution, false imprisonment or seduction, or to a claim based on an allegation of fraud. The same test applies to both plaintiffs and defendants – that the other party's defence or claim “has no real prospect of success (sections 61 and 62). The court can give

summary judgment on its own motion (section 63). There is still a residual discretion to allow the matter to go to trial (section 64)

Summary judgment in the context of the Civil Procedure Act

The new test for summary judgment is a requirement to show that the claim, defence or counterclaim has “no real prospect of success”. This is intended to be a liberalisation of the requirements for summary judgment. This new test was recommended by the Victorian Law Reform Commission:⁴⁰

“The threshold issues is whether there should be a liberalisation of the criteria for summary disposal of a claim or defence. On balance, the commission has concluded that the present requirements to show that there is no defence, or no cause of action, or no real question to be tried are unduly restrictive. Summary disposition should be available where a claim or defence has ‘no real prospect of success’. This is arguable a more liberal test, is consistent with the rules applicable in some other jurisdictions, and a change in the formulation may encourage a more robust approach to be adopted by parties and courts.”

The language of the new test, “no real prospect of success”, is cast differently and apparently in more liberal terms than the existing test. Nevertheless there is, of course, a danger that the interpretation of these provisions on a more literal basis may result in their actual operation more or less reflecting the status quo. For example, Lord Hope in *Three Rivers District Council v Bank of England* said:⁴¹

“The difference between a test which asks the question ‘is the claim bound to fail?’ and one which asks ‘does the claim have real prospect of success?’ is not easy to determine ... While the difference between the two tests is elusive, in many cases the practical effect will be the same.”

However, in my view the adoption of a more literal approach would be to overlook the context of these provisions in the new regime established by the Act, its legislative history, and that of these particular provisions. These are matters to which the Interpretation of Legislation Act 1984 (Vic) directs attention.⁴²

The legislative context is critical. The summary disposition provisions are part of a regime that includes the overarching purpose, overarching obligations, and more rigorous case management provisions.

⁴⁰ Victorian Law Reform Commission, *Civil Justice Review Report*, Report No. 14 (2008), page 355 at 10.7.

⁴¹ [2001] 2 All ER 513 at [541].

⁴² See *Interpretation of Legislation Act 1984* (Vic) s 35.

Parties and solicitors have an overarching obligation requiring them “not make any claim or make a response to any claim that 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.”⁴³ If this obligation is complied with it is difficult to see how a claim or defence could have “no real prospect of success”. Consequently, as noted previously, it seems significantly less likely that parties will need to pursue a summary judgment application if their obligations under the Act are complied with.

More interaction between the parties, and the exchange of documents, prior to commencing proceedings should help to filter out claims that have “no real prospect of success”.

On commencing proceedings and defending proceedings a party’s legal representative or the party personally must certify that “(a) each allegation of fact in the document has a proper basis; (b) each denial in the document has a proper basis; (c) there is a proper basis for each non-admission in the document”.⁴⁴ Again, this requirement will focus parties and their representatives on the strength of their claims before commencement.

Summary judgment and case management

Once proceedings have commenced the courts can utilise their case management powers. Summary judgment is one aspect of case management. This is made clear by section 47(3)(c) which states “a court may actively case manage civil proceedings by:

“(c) deciding the order in which the issues in dispute in the civil proceeding are to be resolved including—

(i) deciding promptly which issues need full investigation and a hearing; and

(ii) disposing summarily of other issues;”

Under section 63(2)(c) a court can even give summary judgment “on the court’s own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.” Exercising this power would be a strong use of case management powers, but it may

⁴³ *Civil Procedure Act 2010*, s 18(d).

⁴⁴ *Civil Procedure Act 2010*, s 42(1).

be appropriate and useful in particular circumstances, whether to dispose of the whole proceeding or particular parts of or issues in the proceeding.⁴⁵

Discovery

Discovery is one of the most expensive aspects of litigation. It is also time consuming for both the parties and the judge. It produces a seemingly unlimited number of documents with what is usually limited relevance to the crux of the dispute. Courts are continuing to develop rules to deal with this growing problem.

Supreme Court Rules relating to discovery

The CPA provides that unless otherwise ordered by a Court, the test for whether documents need to be discovered is to be determined by relevant Court Rules (s54 of the Civil Procedure Act 2010”).

The approach that Courts’ Rules take in relation to discovery is narrower than the Peruvian Guano approach – and adoption of a narrow approach will bring Victoria in line with other Australian jurisdictions

The new discovery provisions, model the Federal Court Rules, and are contained in the Supreme Court (Chapter I Amendment No. 18) Rules 2010 (Vic) (“2010 Rules”) came into force as of 1 January 2011 (r 3 2010 Rules).

The 2010 Rules created a new rule r29.01.1 in the Supreme Court (General Civil Procedure) Rules 2005 (Vic). Relevantly for present purposes it reads:

(1) Unless the Court otherwise orders, discovery of documents pursuant to this Order is limited to the documents referred to in paragraph (3).

(2) Paragraph (1) applies despite any other rule or law to the contrary.

(3) Without limiting Rules 29.05 and 29.07, for the purposes of this Order, the documents required to be discovered are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given—

- (a) documents on which the party relies;
- (b) documents that adversely affect the party's own case;
- (c) documents that adversely affect another party's case;
- (d) documents that support another party's case.

⁴⁵ See *Civil Procedure Act* 2010, s 63(1).

(4) Notwithstanding paragraph (3)—

(a) if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is given, the party giving discovery is not required to discover that document;

(b) a party required to give discovery who has, or has had in his, her or its possession more than one copy, however made, of a particular document is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.

(5) For the purposes of paragraph (3), in making a reasonable search a party may take into account—

(a) the nature and complexity of the proceeding;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document to be found; and

(e) any other relevant matter.

General power of the court to order or limit discovery under the CPA

- Section 55 of the CPA also makes explicit the Court’s general power (which was referred to in r 1.14 of the Supreme Court Rules, r 1.14 and 34A of the County Court Rules, and the “overriding objective” in the Magistrates’ Court (rr 1.02, 1.19, 1.22 and r35.03) to control proceedings and limit discovery
 - This approach has brought Victoria into line with other Australian jurisdictions where clearly delineated powers in relation to discovery are spelt out
- This is reflected in the new provisions of the Supreme Court Rules
 - The new r 29.05.1 provides that “At any stage of the proceeding, the Court may order any party to give discovery in accordance with Rule 29.01.1”
 - The new r 29.05.2 provides that the Court, at any stage of the proceeding, may make an order to expand discovery beyond that required at r 29.01.1

55 Court orders for discovery

- (1) A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.
- (2) Without limiting subsection (1), a court may make any order or give any directions—

- (a) requiring a party to make discovery to another party of—
 - (i) any documents within a class or classes specified in the order; or
 - (ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;
 - (b) relieving a party from the obligation to provide discovery;
 - (c) limiting the obligation of discovery to—
 - (i) a class or classes of documents specified in the order; or
 - (ii) documents relating to one or more specified facts or issues in dispute;
 - (d) that discovery occur in separate stages;
 - (e) requiring discovery of specified classes of documents prior to the close of pleadings;
 - (f) expanding a party's obligation to provide discovery;
 - (g) requiring a list of documents be indexed or arranged in a particular way;
 - (h) requiring discovery or inspection of documents to be provided by a specific time;
 - (i) as to which parties are to be provided with inspection of documents by another party;
 - (j) relieving a party of the obligation to provide an affidavit of documents;
 - (k) modifying or regulating discovery of documents in any other way the court thinks fit.
- (3) A court may make any order or give any directions requiring a party discovering documents to—
- (a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;
 - (b) make available a person who is able to—
 - (i) explain the way the documents are arranged; and
 - (ii) help locate and identify particular documents or classes of documents.

NB: Sanctions are contained in s 56 “Court may order sanctions”

Federal Court Rules 2011

The Federal Court Rules 2011 are a new set of rules which, amongst other things, will take court control of the discovery process in the Federal Court of Australia even further. They will commence operation on 1 August 2011.

20.11 Discovery must be necessary for determination of issues

A party must give discovery only if it is necessary for the determination of issues in the proceeding.

20.12 No discovery without court order

(1) A party must not give discovery unless the Court has made an order for discovery.

(2) If a party gives discovery without being ordered by the Court, the party is not entitled to any costs or disbursements for the discovery.

Note Party is defined in the Dictionary.

Existing FCR: Order 15 r 1

20.13 Application for discovery

(1) A party may apply to the Court for an order that another party to the proceeding give discovery.

(2) The application must state:

(a) whether the party is seeking standard discovery; or

(b) the proposed scope of the discovery.

(3) An application may not be made until 14 days after all respondents have filed a defence.

(4) The Court may order that discovery be given by an electronic means.

In its March 2011 final report *Managing Discovery – Discovery of Documents in Federal Courts* the Australian Law Reform Commission has recommended that the courts become more closely involved in the practical aspects of discovery to ensure that the costs of discovery are proportionate to the complexity of the issues in dispute.⁴⁶ The ALRC recommends that the courts order discovery plans, which deal with the time, cost and manner of discovery rather than just the documents to be discovered. Depending on the proceeding these practical issues could be dealt with in great detail so that each party knows what is expected of the other. Issues of electronic discovery and the like could (and, in my view, should generally) be dealt with in the discovery plan. This type of court involvement will require judges to become further accustomed to the methods and costs of discovery. The courts already have the power to make such orders, but specific guidance in the court rules or practice notes would provide guidance as to the courts' expectations.

The ALRC also recommends that courts should, in certain circumstances, consider capping the costs of discovery, having the costs paid in advance or security for costs

⁴⁶ Australian Law Reform Commission “*Managing Discovery – Final Report – Discovery of Documents in Federal Courts*”, Report 115, March 2011, 174-179.

provided by the party requesting discovery.⁴⁷ This idea is particularly important as a judge will often not know the extent to which discovery has occurred or its cost until a dispute about costs arises, often after trial and, of course, when it is too late!

Conclusion

The complexity of litigation has continued to increase, as have the costs. The various reforms and proposed reforms to the regulation of the legal profession, civil procedure and the courts are aimed at dealing with this complexity in a more efficient way, and, hopefully, limiting the costs. There is no doubt that Aon was a step in the right direction, adding to the case management armoury. However, the case only raises broad principles and leaves their practical application to the courts on a case by case basis. Aon does not, on its own facts, provide a useful example for the conduct of the Commercial Court or a judge. The type of application made would be likely to receive little sympathy in a managed court list, such as those provided in the Commercial Court.

The importance of Aon is in relation to the case management issues that arise every day. Pleadings arguments, particulars disputes and discovery applications are frequent, and costly. Applications to extend deadlines are common. Judicial management is a major factor in narrowing issues and keeping litigation on track. However, it is my view, that no matter how involved a judge becomes in the management of litigation to define the issues, until practitioners and parties do not have incentives (whether they be financial or tactical) to spend time in interlocutory proceedings the problems of delay and expense will not finally be addressed. Professor Zuckerman argues that while litigants have an incentive to use procedural tactics to their own advantage and while lawyers have a financial interest in conducting complicated litigation there will be a tension with the courts in seeking to manage litigation efficiently.⁴⁸ Thus Professor Zuckerman commented:⁴⁹

A system in which the courts continually have to pitch themselves against the professional instincts of lawyers is bound to be inefficient. It can hardly be denied that the judicial task of controlling litigation is bound to be easier when its objective is shared by practitioners, and

⁴⁷ Ibid 240.

⁴⁸ 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, 62-67.

⁴⁹ Ibid 68.

much harder when the court's aim runs counter to that of practitioners

So long as the current billing and procedural practices continue, the courts can only be partially successful in managing litigation – lawyers and courts will often be at cross purposes.⁵⁰ Although effective case management produces more effective litigation, further efficiencies may flow from a detailed review, both economic and legal, of the present costs regime and also the basis for the remuneration of practitioners.⁵¹ These are issues for further careful consideration.

⁵⁰ Ibid 69 and 73.

⁵¹ Doubts about the efficiency of time billing are well known, see, eg, The Hon J J Spigelman AC, Chief Justice of the Supreme Court of NSW, “Opening of the Law Term 2004” (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004).