



The Civil Procedure Act and Case Management *

The Hon. Justice Clyde Croft¹

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Introduction

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.² The CPA implements many of the recommendations made in the Victorian Law Reform Commission’s *Civil Justice Review Report*.³ 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: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 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

² *Civil Procedure Act 2010*, s 4(3).

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

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

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.

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.

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.⁹ 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

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 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.

in civil litigation in England since the reform of the *English Civil Procedure Rules 1998* (the “Woolf reforms”¹⁰), 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.¹¹

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’.¹²

An ‘overarching purpose’ for the courts

In the words of the Attorney General in his Second Reading speech, the CPA introduces:¹³

[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

¹⁰ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

¹¹ 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.

¹² *Aon* (2009) 239 CLR 175 at 217.

¹³ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2608, Mr Hulls (Attorney-General).

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”.¹⁴ 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;

¹⁴ *Civil Procedure Act 2010*, sections 8 and 9.

- (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 similarity between the overarching purpose in the CPA and rule 1.14 does not diminish the overarching purpose's importance. As has been recognised in extra-judicial writing by Justice Sackville:¹⁵

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):¹⁶

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.

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

¹⁵ The Hon. Ronald Sackville AO, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 211, 217.

¹⁶ 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.

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 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 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.

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 Commercial Court *Green Book*.¹⁷ In fact the *Green Book* and Commercial Court practice should be instructive of the way in which procedural decisions will be made under the CPA.

The objective of the Commercial Court is, as stated in paragraph 2.1 of the *Green Book*,¹⁸ 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. This objective is very similar to the overarching purpose under the CPA. 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. While matters outside the Commercial Court do not always receive this treatment, guidance can be provided by the management principles adopted in the Commercial Court

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*.¹⁹ It is in the context of the “Court Objective and Policies” of the Commercial Court that procedural issues are to be determined.²⁰ The *Green Book* contains detailed and specific provisions for the procedural steps of a Commercial Court proceeding –

¹⁷ *Civil Procedure Act* 2010, section 53.

¹⁸ Practice Note 1 of 2010 – Commercial Court

¹⁹ See also the *Supreme Court Act 1986* (Vic) particularly s 29(2).

²⁰ See *Green Book*, Paragraph 2, pp. 3 and 4.

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*.²¹ 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 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;

²¹ See *Green Book*, Paragraph 7 (Case Management) and paragraph 8 (Directions Hearings).

²² See *Green Book*, paragraph 2.4.2.

- (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 narrow the 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 Book*²³ 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.

The role of the courts in case management

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).

In managing civil disputes each judge will be striving to achieve the overarching purpose The modern judicial task ‘requires skills and imposes burdens that historically formed no part of the judicial role.’²⁵

The CPA and, for Commercial Court judges, the *Green Book*, provide the framework in which judges 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.’²⁶ Thus the task of judge inherently requires an understanding of the unique circumstances of a case from the commencement of proceedings. The extent to which this is possible will vary. In managed lists, such as those within the Commercial Court, judges become aware of the issues in each case from beginning to end. 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.”²⁷ It also requires an appreciation of the fact that speed does not necessarily equate with efficiency²⁸ and that ‘there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.’²⁹ Notwithstanding these issues and challenges, the CPA has

²⁵ The Hon. Ronald Sackville AO, “The future of case management in litigation”, (2009) 18 *Journal of Judicial Administration* 211, 217.

²⁶ 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.

²⁷ 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.

²⁸ 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.

²⁹ 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.

provided greater impetus to judges, to utilise case management powers when required.

Pre-litigation requirements

The pre-litigation requirements apply to proceedings that are commenced on or after 1 July 2011; but with some types of proceedings excluded from these requirements³⁰ Practically speaking this means that practitioners must consider the impact of the requirements now for litigation that is going to be commenced in the second half of the year and beyond. The pre-litigation requirements are set out in section 34:

34 Pre-litigation requirements

(1) Each person involved in a civil dispute must take

³⁰ Certain types of proceedings are excluded from the pre-litigation requirements:

Civil Procedure Act 2010, Section 32

(1) This Part and Part 3.2 do not apply to—

- (a) a civil proceeding which is an appeal;
- (b) a civil proceeding under section 33 or 39 of the Charter of Human Rights and Responsibilities Act 2006;
- (c) any proceeding in which civil penalties under a civil penalty provision (however designated) of or under an Act (including a Commonwealth Act) are sought;
- (d) a civil dispute which has been conducted in accordance with a pre-litigation process—
 - (i) subject to section 39, for claims made under Part 6 of the Transport Accident Act 1986;
 - (ii) for claims made under the Accident Compensation Act 1985;

Note

If a claim referred to in this paragraph is not conducted in accordance with a pre-litigation process, the civil dispute is not excepted from the application of this Part and Part 3.2.

- (e) a civil dispute to which the Corporations Act or the ASIC Act applies;
- (f) a civil dispute where a party is in dispute with a person who has been declared a vexatious litigant under section 21 of the Supreme Court Act 1986.

(2) This Part and Part 3.2 do not apply to any civil proceeding or class of civil proceeding if rules of court provide that the pre-litigation requirements do not apply to that proceeding or that class of proceeding.

reasonable steps, having regard to the person's situation and the nature of the dispute—

(a) to resolve the dispute by agreement; or

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

(2) For the purposes of this section, reasonable steps include, but are not limited to—

(a) the exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;

(b) the consideration of options for resolving the dispute without the need for civil proceedings in a court, including, but not limited to resolution through genuine and reasonable negotiations or appropriate dispute resolution.

(3) Each person involved in a civil dispute must not unreasonably refuse to participate in genuine and reasonable negotiations or appropriate dispute resolution.

A civil dispute is defined in section 3 as “a dispute which may result in the commencement of a civil proceeding”.

This requirement places obligations on parties from the time a dispute arises – possibly even before they have considered litigation. Given the framework of the CPA the model litigant will be aware of the possibility of litigation while doing everything in his or her power to avoid it. These pre-litigation requirements apply to potential litigants before retaining legal practitioners. Once retained, a practitioner will need to assess whether

their client has fulfilled its pre-litigation requirements. Correspondence with the other potential parties will be essential, and will need to set out the client's case in some detail if it is to be considered a reasonable attempt to resolve the dispute and narrow issues. Critical documents and information will need to be exchanged – all outside of any “discovery” regime that will apply once litigation is commenced. While this may seem alien to the way that disputes have been dealt with in the past, it is an important aspect of the dispute resolution culture that the CPA is aimed at. Litigation is a last resort and, generally speaking, parties should not be able to utilise public resources to resolve private disputes until reasonable settlement attempts have been made.

At a first directions hearing practitioners should be prepared to inform the judge whether pre-litigation requirements have been complied with, including whether critical documents have been exchanged. If not, a court may order that a party pay another party's costs of complying with the pre-litigation requirements,³¹ or that a representative of the party pay the costs.³² The pre-litigation costs can be taxed by the Costs Court.³³ The usual rule that parties pay their own pre litigation costs may not apply.

³¹ *Civil Procedure Act* 2010, section 38(1).

³² *Civil Procedure Act* 2010, section 38(2).

³³ *Civil Procedure Act* 2010, section 38(3).

Obligations on parties and lawyers to certify adherence to pre-litigation requirements

Part 4.1 of the CPA includes a series of provisions that require certifications (i) that parties have complied with the pre-litigation requirements (or if these have not been complied with, a statement setting out the reasons for such non-compliance is required),³⁴ (ii) by the parties that they have read and understood the overarching obligations (to be provided by parties with their pleadings),³⁵ and (iii) that the allegations and denials made have a proper basis (to be certified by lawyers when filing the pleading).³⁶

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”.³⁷ 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

³⁴ *Civil Procedure Act 2010*, section 43.

³⁵ *Civil Procedure Act 2010*, section 41.

³⁶ *Civil Procedure Act 2010*, section 42.

³⁷ *Civil Procedure Act 2010*, section 16.

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.³⁸ 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.³⁹ 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 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

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

³⁹ *Civil Procedure Act 2010*, section 13(3)(b)

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.⁴⁰

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*

⁴⁰ *Civil Procedure Act* 2010, sections 29(2)(b), 38(4)(a), 39(2)(a) and s 63(2)(c).

or part of that defence has no real prospect of success.

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 basics

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:⁴¹

“The threshold issues is whether there should be a liberalisation of the

⁴¹ Victorian Law Reform Commission, *Civil Justice Review Report*, Report No. 14 (2008), page 355 at 10.7.

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:⁴²

“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.⁴³

⁴² [2001] 2 All ER 513 at [541].

⁴³ See *Interpretation of Legislation Act 1984* (Vic) s 35.

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.

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.”⁴⁴ 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.

Summary judgment should also be viewed in the context of the pre-litigation requirements which require proper correspondence and exchange of critical documents. 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”.⁴⁵ Again, this requirement will focus parties and their representatives on the strength of their claims before commencement. Spending time before commencing litigation to produce a complete and detailed statement of claim, in matters where all the necessary information is available, is advisable under the CPA

⁴⁴ *Civil Procedure Act* 2010, s 18(d).

⁴⁵ *Civil Procedure Act* 2010, s 42(1).

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 be appropriate and useful in particular circumstances, whether to dispose of the whole proceeding or particular parts of or issues in the proceeding.⁴⁶

As discussed above in relation to the overarching obligations, courts will still require the parties to pursue efficient litigation practice. This is a party’s responsibility under the CPA, as has been discussed. Therefore, the usual situation will be that a party applies for summary judgment. This will usually occur after the parties have already complied with their pre-litigation obligations, exchanged critical documents and made a genuine attempt to settle the dispute or narrow the issues. Each party should be familiar with its case. If, by this stage, a party can only put forward a claim or defence that has “no real prospect of success” then, as a matter of case management,

⁴⁶ See *Civil Procedure Act* 2010, s 63(1).

judgment should be entered. The result of good case management is that proceedings may be disposed of at varying stages, whether it be by consent or as a result of a combination of all or some of case management, appropriate dispute resolution and summary dismissal. Effective processes of this kind together with insistence on substantive compliance with the pre-litigation requirements should discourage commencement and prosecution of cases with little or no merit.

The giving of summary judgment is never a power to be exercised lightly in a liberal democratic society where the rule of law and access to the courts are among its crucial foundations. Care must be taken, especially when summary disposal might be seen by parties as an oppressive tactic for the purpose of, either or both, preventing the other party having a chance to put its claim or defence properly or as a means of increasing the costs burden on the other party in the hope that it will be forced to discontinue.

The Victorian Law Reform Commission's *Civil Justice Review Report* also raised the issue that summary disposal of cases may inhibit developments in the law – hence the thought provoking comment, “one can only speculate on what may have happened in the development of tort law if the plaintiff's claim in *Donoghue v Stevenson*⁴⁷ had been summarily dismissed.”⁴⁸ In my view, this concern is outweighed by the benefits to individual parties and the community to be gained as a result of effective case management. First, if an important point of law is raised, the judge may decide that, in all the circumstances, summary disposition is not appropriate, even though the test for summary disposition is satisfied, and that the matter should proceed to trial; exercising the discretion in this respect provided by section 64. Secondly, the overwhelming majority of disputes are settled prior to trial. It would seem very difficult

⁴⁷ [1932] AC 562.

⁴⁸ VLRC, “Civil Justice Review Report”, Report No. 14 (2008) page 355 at 10.7.

to justify discouraging this simply for the purpose of maintaining proceedings which may assist in the development of the law - for the community at the expense of the parties. Additionally, many disputes that are settled prior to the issuing of proceedings, at mediation, or are determined by arbitration, raise issues that could contribute to the development of the law – which, incidentally, may make them easier to settle unless parties are particularly adventurous. Of course this does not mean that these appropriate dispute resolution methods should not be encouraged. Thirdly, litigants will still be able to appeal a summary judgment to the Court of Appeal, which keeps open an avenue of law making. Fourthly, a summary disposition application may include arguments on significantly unsettled law. If a party’s case relies on a development of the law in these circumstances the judge may find this of significance in deciding whether a claim or defence has “no real prospect of success”, or whether the discretion should be exercised in favour of a trial in any event.

Flexibility and proportionality of procedures is one of the key elements in successful case management in pursuit of the overarching purpose. This applies to courts exercising all the powers under the CPA, but the summary judgment provisions are a good example. The courts in hearing summary judgment applications should adapt the procedure to match the complexity of the dispute. If a summary judgment application has been made in a complex and costly case, it may be appropriate to give significant time to the summary judgment application. The court may ultimately determine that the proceeding or defence has “no real prospect of success” and dispose of the proceeding and avoid wasted costs. In this vein, Lord Hobhouse, in *Three Rivers DC v The Governor and Company of the Bank of England (No. 3)*, made the following comment:⁴⁹

“The volume of documentation and the complexity of the issues raised

⁴⁹ [2003] 2 AC 1 at [156] to [157].

on the pleadings should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sorts of case which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties.”

Similarly, Lord Roskill, in *Ashmore v Corporation of Lloyd's*, said:⁵⁰

“The Court of Appeal appear to have taken the view that the plaintiffs were entitled of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible ... Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn ...”

In a small case there may be a point of law or construction that could be determined rather quickly.

It is also important to note that a summary judgment does not need to apply to the whole of a claim or defence. Parties might be encouraged to make summary judgment applications to dispose of aspects of a claim or defence that are thought to have no real prospect of success. This approach is obviously more efficient than waiting for

⁵⁰ [1992] 1 WLR 446

judgment at trial and then applying for costs and is likely to be more flexible than using procedures for the purpose of stating and deciding preliminary, separate, questions.⁵¹

A further benefit of a more robust approach to summary judgment applications is that it will provide a major incentive to parties to properly consider and formulate their claims as early as possible, or they will know that they are at risk of having judgment entered against them. This spectre is also likely to strengthen the force of the pre-litigation requirements of the Act and assist in preventing them becoming just another formal and expensive step in the litigation process. It will also help to avoid situations such as that which arose in *Aon Risk Services v Australian National University*⁵² (“*Aon*”) where a party attempted to amend its claim after the trial had already begun, which required an adjournment of the trial.

⁵¹ For example, under rule 47.04 of the *Supreme Court Rules*.
⁵² (2009) 239 CLR 175

Discovery under the CPA

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 CPA”).

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

Court Rules relating to discovery

Federal Court

- The *Federal Court Rules 1979* (Cth), in O 15 r 2, reflect the recommendations of Lord Woolf, and are to be adopted across the Victorian Court hierarchy. They are identical to the 2010 Supreme Court discovery Rules, extracted below.

Supreme Court

- The new discovery provisions, model the Federal Court Rules, and are contained in the *Supreme Court (Chapter 1 Amendment No. 18) Rules 2010* (Vic) (“2010 Rules”) came into force as of 1 January 2011 (s3 2010 Rules)
- The 2010 Rules created a new rule s29.01.1 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.

(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.

County and Magistrates' Court

The County and Magistrates' Courts have made Rules matching the Supreme and Federal Court Rules above.⁵³

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—

⁵³ See *County Court (Chapter I Amendment No. 2) Rules 2010*, Part 3; *Magistrates' Court General Civil Procedure Rules 2010*, Order 29.

- (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”

Conclusion

Before a body of case law and practice applying the CPA develops there will remain some doubt as to how its provisions will be applied. Despite this, there are some key principles that are clearly applicable, the content of which does not depend significantly on the interpretation of the CPA provisions. First, it is clear that the dispute resolution culture will need to change so that litigation is truly seen as a last resort with serious attempts to being made in the first instance to utilise “appropriate dispute resolution processes”. Secondly, parties to disputes will need to engage with each other in a productive way from the time that a dispute arises, and not only once litigation has been commenced. A failure to do so may have serious consequences under the provisions of the CPA, an appreciation of which will drive this cultural change. Thirdly, the effect of the CPA will be to require more preparatory work and careful assessment of claims and likely defences before litigation is commenced; as unprepared parties and lawyers risk being found in breach of the overarching obligations. Again, the possible enforcement of consequences under the CPA will drive cultural change. Fourthly, the courts will be flexible in using their case management powers and will

attempt to achieve proportionality between the complexity of the dispute and the procedure adopted.