

“Civil Procedure Reform”

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A seminar presented by Counsel of Gordon & Jackson’s List

Chair: Richard Smith SC
Presenters: Michael Heaton QC
Daniel Aghion

GORDON & JACKSON
Barristers’ Clerks
205 William Street
Melbourne 3000

Dx 94 Melbourne Vic
Ph 9225 7333
www.gordonandjackson.com.au

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CIVIL PROCEDURE REFORM

INTRODUCTION

*Change is the only constant.*¹

[The English civil justice system is] *an exquisitely contrived chicanery which maximises delay and denial of justice.*²

1. Just and efficient dispute resolution of civil disputes has been a concern of the common law for at least two hundred years.³ More recently, the Victorian Government published a "Justice Statement".⁴ The Justice Statement set out "*new directions*" and "*initiatives to modernise the justice system and ensure that it remains flexible and responsive to change*".
2. The Justice Statement led, in part, to the passing of the *Civil Procedure Act 2010* (Vic),⁵ and the consequential amendment to the procedural rules in each of the State courts. The CPA came in operation on 1 January 2011.
3. At the Commonwealth level, the *Civil Dispute Resolution Act 2011* (C'th)⁶ was assented to on 12 April 2011, and will apply to federal proceedings commenced after its proclamation later this year.
4. Other States have instituted civil procedure reforms in recent years,⁷ or have conducted or are conducting reviews of civil procedure.⁸
5. This paper will review the CPA and the CDRA, and their effect on the practice of civil dispute resolution in the State and Federal courts.

¹ Heraclitus, *Lives of the Philosophers*

² Jeremy Bentham, as quoted by French CJ in *AON Risk Services Aust Ltd v ANU* (2009) 239 CLR 175 at 183-4 [10].

³ See the historical summary given by French CJ in *Aon*.

⁴ Attorney-General's Justice Statement May 2004 (Vic). This is not a novel concept. The Commonwealth published a Justice Statement in May 1995.

⁵ Hereinafter **CPA**.

⁶ Hereinafter **CDRA**.

⁷ *Civil Procedure Act 2005* (NSW), esp. Part 2A.

⁸ *Review of the criminal and civil justice system in Western Australia* (1999) Law Reform Commission of Western Australia publication no.92; *The Moynihan review* (Qld).

GENERAL CONCEPTS

The Civil Procedure Act (CPA)

6. The “main purposes” of the CPA are:
 - a) to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme, County and Magistrates’ Court and provide for uniformity;
 - b) to simplify the language relating to civil procedure; and
 - c) to provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.⁹
7. With some exceptions, the CPA applies to all civil proceedings.¹⁰ Generally speaking, the exceptions are quasi-criminal proceedings, proceedings at VCAT, and any proceedings under a prescribed Act.¹¹
8. The CPA applies to an appeal from a civil proceeding, and to a dispute resolution process in a civil proceeding, as much as it does to the civil proceeding itself.¹²
9. The CPA does not however override the Charter of Human Rights, or the doctrine of privilege.¹³
10. The CPA introduces three new concepts:
 - a) an overarching purpose;
 - b) overarching obligations; and
 - c) appropriate dispute resolution.

⁹ CPA s7(1).

¹⁰ CPA s4(1).

¹¹ CPA s4(2)-(4); to date, no Act has been prescribed.

¹² See eg CPA s11.

¹³ CPA s6. The CPA does not specify what type of privilege is intended. It may be assumed to be privilege of any type.

Overarching purpose

11. The overarching purpose of the CPA is to “*facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute*”.¹⁴
12. The overarching purpose is mandatory. That is, a court must seek to give effect to the overarching purpose in the exercise of its powers.¹⁵

Overarching obligations

13. The overarching obligations apply to parties to civil proceedings, legal practitioners acting for those parties, those who provide financial or other assistance and exercise direct or indirect control or influence over proceedings or parties such as insurers and litigation funders. They also apply to expert witnesses.¹⁶ These obligations apply at all stages of a civil proceeding.¹⁷
14. Most importantly, a legal practitioner must comply with the overarching obligations despite a client’s instruction to the contrary.¹⁸ Where there is a conflict between a client’s instruction and the overarching obligation, the overarching obligation prevails.¹⁹ Further, a legal practitioner must not by their conduct cause the client to contravene any overarching obligation.²⁰ A legal practitioner who receives an instruction that is inconsistent with an overarching obligation, must therefore refuse to act upon that instruction.²¹
15. The overarching obligations are:
 - a) to further the administration of justice - described in the CPA as a “paramount duty”;
 - b) to act honestly at all times;

¹⁴ CPA s7(1).

¹⁵ CPA s8(1).

¹⁶ CPA s10.

¹⁷ CPA s12.

¹⁸ CPA s13(2).

¹⁹ CPA s13(3)(a).

²⁰ CPA s14.

²¹ CPA s13(3)(b).

- c) not to make a claim or response in a civil proceeding without a proper basis;
- d) not to take a step in connection with a civil proceeding, unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding;
- e) to cooperate with the parties and the court in connection with the conduct of the proceeding;
- f) to refrain from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive;
- g) to use reasonable endeavours to resolve a dispute by agreement, unless it is not in the interests of justice or it is inappropriate to do so;
- h) to use reasonable endeavours to resolve individual issues or narrow the scope of issues in dispute, unless it is not in the interests of justice or it is inappropriate to do so;
- i) to use reasonable endeavours to ensure that legal and other costs are reasonable and proportionate to the complexity or importance of the issues in dispute, and the amount in dispute;
- j) to use reasonable endeavours to act promptly and minimise delay;
- k) to disclose the existence of critical documents which:
 - i) are or have been in a person's possession, custody or control; and
 - ii) of which the person is aware; and
 - iii) which the person considers, or ought reasonably to consider, are critical to the resolution of the dispute; and
- l) not to use any critical information or documents disclosed by another person in the proceeding for any purpose other than that proceeding.²²

16. There are a range of sanctions that a court may impose for a breach of the overarching obligations, which are discussed below.

²² CPA Part 2.3.

Appropriate dispute resolution

17. “Appropriate dispute resolution” is defined, perhaps not surprisingly, as a process of resolving and narrowing the issues in dispute. The definition provides an inclusive list of appropriate dispute resolution methods. That list includes presently under-utilised methods such as early neutral evaluation, special reference and expert determination.²³
18. It is a moot point whether there is any difference between “appropriate dispute resolution” and the commonly used phrase “alternate dispute resolution”. The former suggests resolution as part of a court process rather than as an alternative to it.
19. If the new terminology of “appropriate dispute resolution” connotes a change in practice, then we suggest that it is one of emphasis – negotiation and resolution are now an integral part of the civil process as opposed to an alternate track. That, in turn, implies greater judicial intervention in the setting up and carrying out of dispute resolution processes. In the Federal Court and VCAT for example, it is not uncommon for the parties to be ordered to attend a compulsory mediation or conciliation during the running of a trial. We are aware of the Supreme and County Courts adopting this practice with increasing frequency this year.

The Civil Dispute Resolution Act (CDRA)

20. The CDRA has a more limited purpose. It requires disputants to take “genuine steps” to resolve disputes before commencing a civil proceeding in the Federal Court or Federal Magistrates Court.²⁴ A person will have taken genuine steps if they make a sincere and genuine attempt to resolve the dispute, having regard to the person’s circumstances and the nature and circumstances of the dispute.²⁵

²³ CPA s3.

²⁴ CDRA s3.

²⁵ CDRA s4(1A).

PRE-LITIGATION

Pre-litigation steps

21. The CPA in original form required the parties to a dispute to engage in a compulsory pre-litigation process.²⁶ The process was more prescriptive than the “genuine steps” requirement of the CDRA, but not as elaborate as the quite complex pre-action protocols that have been enacted in some other jurisdictions.²⁷
22. In repealing the PLRs in the CPA the Attorney General, Mr Robert Clark, stated:
- Section 9(2) of the Act will still enable the court, in making orders and giving directions under the Act, to have regard to the extent to which parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute. This provision will give the court discretionary power to take action against parties who act unreasonably in not seeking to resolve their dispute, without burdening all parties with unnecessary procedural requirements.
23. Thus despite the repeal of Chapter 3 the Government:
- a) first, endorses the culture created by and mandated by the CPA;
 - b) second, acknowledges best practice is to resolve disputes without resorting to litigation;
 - c) third, considers that litigation should remain an option of last resort; and
 - d) fourth, ensures that the Courts retain the power to make rules for PLRs, if thought appropriate.
24. The current State Government has since amended the CPA so as to delete the pre-litigation requirements.²⁸
25. Although the pre-litigation requirements have been deleted, the overarching purpose and obligations remain. The overarching

²⁶ Chapter 3 (now repealed).

²⁷ See eg *Personal Injuries Proceedings Act 2002* (Qld).

²⁸ *Civil Procedure and Legal Profession Amendment Act 2011* (Vic), which repealed Chapter 3 of the CPA.

obligations apply to “any aspect of a civil proceeding”.²⁹ We consider that it would be false comfort however to think that the overarching obligations need only be considered once a civil proceeding has commenced. A lawyer might find themselves in difficulty for example, if they advised the client to commence a meritless proceeding for the sole purpose of creating an offsetting claim to an otherwise admitted debt.³⁰

26. As noted above, the CDRA requires the parties to take genuine steps to resolve a dispute before commencing a civil proceeding in the Federal Court or the Federal Magistrates’ Court. The CDRA provides examples of genuine steps that could be taken:
- a) notifying the other person of the issues in dispute and offering to discuss them, with a view to resolving the dispute;
 - b) responding appropriately to any such notification;
 - c) providing relevant information and documents to the other person to enable them to understand the issues involved and how the dispute might be resolved;
 - d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
 - e) agreeing on the person to facilitate the alternate dispute resolution process and attending the process;³¹
 - f) if the alternate dispute resolution process does not lead to resolution, considering a different process; and
 - g) attempting to negotiate with the other person, with a view to resolving some or all of the issues in dispute.³²
27. Even though there is no longer a required pre-litigation process for the State courts, we consider the examples in the CDRA to be a useful list of matters that practitioners might consider in many civil disputes.

²⁹ CPA s11.

³⁰ See *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169; affirmed on appeal *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134.

³¹ Curiously, attempting to agree on the type of process to be adopted is not an example of a genuine step given in the CDRA, but we consider such an attempt to be an obvious example of a genuine step.

Anecdotally, Victorian lawyers have embraced the concept of pre-litigation resolution with enthusiasm. Pre-litigation steps that we have seen in the last few months include:

- letters setting out a chronology of facts and summary of argument, and inviting a without prejudice meeting to discuss the content of the letter (a complex property dispute involving title and rectification of a lease);
- formal mediation by an accredited mediator (a partnership dispute between family members; a property dispute involving contaminated land);
- binding expert determination of a legal issue, with quantum then resolved between the parties in accordance with the determination (a dispute over the meaning of a clause in a contract for the supply of services); and
- an offer to negotiate an agreed 'pre-action protocol' including the exchange of statements of issues, access to critical documents and a joint experts' conference (a large products liability case with insurers on both sides of the dispute).

Note also that franchising disputes³³ and retail lease disputes³⁴ require mediation before commencement of proceedings.

28. Obviously, some matters do not lend themselves to pre-litigation steps of any substance, for example uncontested debt claims.³⁵ In disputes of substance however, there is merit in practitioners giving consideration to such pre-litigation steps as might be appropriate to the dispute.
29. The critical aspects, in our view, are active consideration of the issue – whether pre-litigation process is appropriate for a particular civil dispute; and flexibility – what type of pre-litigation process is appropriate for that dispute.

³² CDRA s4(1).

³³ *Trade Practices (Industry Codes – Franchising) Regulations 1998*, Part 4.

³⁴ *Retail Leases Act 2003 (Vic)* s87(1).

³⁵ See *Civil Procedure and Legislation Profession Amendment Bill*, Minister's Second Reading Speech, 10 February 2011.

Without prejudice privilege

30. As noted above, the CPA does not override the doctrine of privilege.³⁶ It does not follow however that privilege automatically attaches³⁷ to all processes adopted in accordance with one's overarching obligations.³⁸ Some pre-litigation processes attract privilege – e.g. a mediation; some do not – e.g. a binding expert determination. It is the practitioner's responsibility, in our view, to consider whether a selected pre-litigation process requires the cloak of privilege to be drawn over that process, and if so, how to ensure that the process is appropriately protected.
31. Most non-determinative pre-litigation settlement negotiations and processes will attract the privilege given by section 131(1) of the *Evidence Acts*, both Commonwealth and State. However if the dispute is not resolved and needs to be determined by the court then it is open to the court to consider communications made and documents disclosed during private mediations and without prejudice communications in determining liability for costs under section 131(2)(h) of the *Evidence Acts*.
32. The rationale was explained in *Silverfox Co Pty Ltd (as trustee for the Baker Family Trust) v Lenard's Pty Ltd (No.3)*.³⁹

Section 131(1) [of the Evidence Act], subject to its exceptions, gives effect to the policy of ensuring the course of negotiations – whether private or by mediation – are not adduced into evidence for the purpose of influencing the outcome of the primary matters in issue. Clearly, it is in the public interest that the negotiations to explore resolution of proceedings should not be inhibited by the risk of such negotiations influencing the outcome of those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is not apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression 'without prejudice' or by a mediation agreement.

³⁶ CPA s6.

³⁷ Specifically, without prejudice privilege.

³⁸ Cf a court-ordered referral to a judicial resolution conference under s66 of the CPA, dealt with below.

³⁹ (2004) 214 ALR 621 at 624 [36] per Mansfield J.

APPROPRIATE DISPUTE RESOLUTION

The role of a court

33. A court may at any time refer a civil proceeding or any part of it to ADR. A referral to a process with a binding outcome – arbitration, special reference or expert determination – requires the consent of the parties. The Court may refer the parties to any non-binding ADR process without the parties' consent.⁴⁰

Non-determinative processes:

Judicial resolution conference

34. A judicial resolution conference⁴¹ is defined in the CPA as a resolution process presided over by a judge, associate judge, magistrate or (where permitted by the rules) a judicial registrar for the purpose of negotiating a settlement of the dispute.
35. The JRC may involve mediation, early neutral evaluation, settlement conference, conciliation, or some other process which satisfies the purpose of negotiating a settlement of the dispute.
36. We have set out, under the various sub-headings below, the rules and practices progressively being adopted by the courts to facilitate the various types of processes that may be available to the court and the parties as part of a JRC.

Mediation

37. Mediation already plays a prominent role in endeavouring to resolve civil disputes in this State. There are however a number of factors to be taken into account such as the appropriate time to mediate and to be able to introduce flexibility into the mediation of the dispute. In some mediations, the parties and their legal advisors get hung up on positional

⁴⁰ CPA s66.

⁴¹ Hereinafter JRC.

bargaining and fail to give attention to what the parties' real needs are and any interest-based bargaining. Practitioners need to be alert to flexibility, needs and lateral thinking.

38. Nearly all mediation in Victoria is facilitative. If it is intended that the mediator give advice, then the National Practice Standards require written consent of the parties to the mediator so doing.⁴²

Early neutral evaluation

39. Early neutral evaluation⁴³ enables parties to obtain an independent, non-binding evaluation of the likely outcome of issues or of the whole proceeding.
40. ENE by a judge has been available in the Commercial Court of the Supreme Court since 1 January 2010.⁴⁴ The parties may by consent seek a without prejudice, confidential and non-binding ENE of the proceeding or of one or more questions in the proceeding with a view to assisting them to resolve by agreement those questions or the proceeding as a whole. Unless otherwise directed, the process provides for the parties to produce a common folder of key documents; the parties provide written submissions of no more than 10 pages on facts and law; the evaluator appoints a date to meet with the parties to answer any questions which the evaluator may have or at the evaluator's discretion to hear any further submissions which a party may wish to make; the hearing is held in private and should not exceed half a day; and any further submissions should be confined to one hour for each party; and the evaluator give an evaluation at the conclusion of the hearing, or at such other time as may be determined in the discretion of the evaluator. The process may be varied and may include oral evidence with or without cross examination. The take-up of the use of ENE in the Commercial Court has not been great.

⁴² *Australian National Mediator Practice Standards*, September 2007, pars 4(g)(i), 10(1), 10(5).

⁴³ Hereinafter **ENE**.

⁴⁴ SC PN 1 2010, Part 11.

41. In the Magistrates Court at Melbourne a pilot ENE program has been introduced for cases selected by the court or found suitable by the court after considering written submissions of one or more of the parties.⁴⁵ The program became operative for one year from 1 November 2010. The ENE is to occur within 8 weeks of the filing of a Notice of Defence. The parties are to be prepared to explain the factual and legal issues to the Magistrate. Unless the Magistrates otherwise directs, no oral evidence will be given. The process and conduct of an evaluation will be in the discretion of the Magistrate. Generally, the parties must bring to the evaluation all documents which support or are injurious to the parties' claim defence or counterclaim. The hearing is in a Magistrates Court but is in private. It is intended not to exceed 3 hours. Each party is given up to 60 minutes to explain their case factually and legally. Some of this time may be spent answering questions of the evaluator. The remaining time is devoted to the evaluation. Usually, the evaluator will give his or her evaluation orally at the end of the parties' submissions. The evaluator may give the evaluation in writing. The ENE is not sound recorded. Parties, their legal practitioners, and a person with authority to settle, and if an insurer is indemnifying a party an officer or employee of the insurer, must attend. The ENE is thus a compulsory non-binding process.
42. We are also aware of other cases where ENE has taken place on a far more significant scale, for instance, over a period of 2 or 3 days before a senior barrister, or sometimes a former judge who will give their view on the outcome of the issues upon which the parties have asked for a non binding evaluation.
43. Early neutral evaluation is essentially "a dry run". We consider ENE will be a useful tool whether it be a single issue case or a case involving a multitude of legal and factual issues.

⁴⁵ MC Practice Direction no.4 of 2010.

Settlement Conference

44. A settlement conference presided over by a judicial officer is likely to be appropriate where parties' resources are limited and the amount in dispute is limited. Judge Misso in the County Court is using settlement conferences with the parties and their legal practitioners to great effect in the property and family provision areas.
45. A settlement conference or case conference is formally provided for in the Commercial List of the County Court.⁴⁶

Conciliation

46. Conciliation differs from mediation, in that the conciliator may make suggestions for settlement of the dispute, and express opinions as to what would constitute a reasonable resolution of the dispute.⁴⁷
47. Conciliation is often appropriate where what is desired is more than facilitative and perhaps where there is to be considerably more robustness than would be the situation at a mediation. We have in mind some employment disputes, particularly unfair dismissals.

Determinative Processes

48. The definition of appropriate dispute resolution under the CPA includes determinative processes of special reference, expert determination and arbitration. They do not, of course, come within the definition of a judicial resolution conference although the court does have power to refer matters to a special referee or for expert determination or to arbitration.

⁴⁶ CC PNCL 6-2010 pars 27-32.

⁴⁷ See e.g. *Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules*, Rule 5.

Expert Determination

49. Single issue cases might also lend themselves to a determinative, binding decision by way of expert determination. If the parties are willing to go down that route then some issues or the whole case might be determined on the basis of an expert determination. This has the benefit of resolution more quickly than would be the processes through the courts but the parties of course are bound by the determination of the expert.

Mix and match

50. In some large and complex cases participants may engage in a staged process or adopt different ADR processes for different issues.

Without prejudice privilege

51. Anything said or done in the course of the conduct of a JRC is not admissible "*at the hearing of any proceeding*". The court may otherwise order that the evidence be admissible, having regard to the interests of justice and fairness.⁴⁸ Compare this to a court-referred mediation presided over by a person who is not a judge. Such a process would be covered the usual statutory mediation privilege,⁴⁹ which only protects against admission of evidence "*at the hearing of the proceeding*". Compare again to a private mediation that is engaged in voluntarily by the parties and is not directed or referred by a court. In that case, s131 of the *Evidence Act 2008* would apply, which provides an exception to privilege "*if the communication or document is relevant to determining liability for costs*".⁵⁰

52. It is thus possible that there are three different tests for the admission of evidence of negotiations, depending upon which process has been adopted:

⁴⁸ CPA s67.

⁴⁹ *Supreme Court Act s24A, County Court Act s47B, Magistrates' Court Act s108(2)*.

⁵⁰ *Evidence Act 2008 (Vic) s131(2)(h)*.

- a) a private mediation - evidence is admissible on the question of costs;⁵¹
- b) a court-referred mediation conducted by a non-judicial mediator - evidence is not admissible on the question of costs arising in the proceeding,⁵² but may be admissible in a different proceeding;⁵³ or
- c) a court-referred mediation conducted by a judicial mediator - evidence is not admissible in the proceeding or any other proceeding, unless the interests of justice and fairness permit.⁵⁴

53. A paradigm case where justice and fairness would permit evidence of negotiations at a JRC to be led, is where one party has an arguable basis in fact to contend that they were misled into entering a negotiated resolution, and that the terms of settlement ought now be set aside.

CONDUCT OF LITIGATION

Certification requirements on commencement – State courts

- 54. The CPA requires two certificates to be prepared and filed with the court – an “overarching obligations certification” and a “proper basis certification”.⁵⁵
- 55. The overarching obligations certification is given personally by the party – not the legal practitioner – and certifies that the party has read and understood the overarching obligations and the paramount duty.
- 56. The duty of the legal practitioner not to cause the client to contravene the overarching obligations⁵⁶ makes it necessarily implicit, in our view, that it is the duty of the party’s legal practitioner to ensure that the party gives the overarching obligations certification and understands its

⁵¹ *Evidence act 2008 (Vic) s131(2)(h)*.

⁵² *Supreme Court Act s24A; Forsyth v Sinclair (No 2) [2010] VSCA 195 per Neave & Redlich JJA and Habersberger AJA.*

⁵³ *Simply Irresistable Pty Ltd v Couper [2010] VSC 505 per Kyrou J.*

⁵⁴ CPA s67.

⁵⁵ CPA Part 4.1.

⁵⁶ CPA s14.

content. In appropriate cases, this will require the overarching obligations to be translated or interpreted into the party's first language.

57. The overarching obligations certification must be filed "*with the first substantive document in the civil proceeding filed by the party*".⁵⁷ In most cases, this will be the writ or originating motion for the plaintiff, and the defence for the defendant.
58. The proper basis certification is given by the party's legal practitioner – or the party if unrepresented – and certifies that each allegation of fact in the document has a proper basis; each denial in the document has a proper basis; and there is a proper basis for each non-admission in the document.
59. The proper basis certification must be filed "*on filing of a party's first substantive document in a civil proceeding and any document that contains significant amendments to the first substantive document*".⁵⁸ That rather begs the question of what constitutes a "*significant amendment*". The relevant County Court Practice Note helpfully states:

The phrase "significant amendments" is not defined in the Act. To provide general guidance, it is suggested that all amending documents which add, delete or substitute a party, a cause of action, a substantive defence, a substantive matter by way of reply or a material allegation of fact should be accompanied by proper basis certification. If a pleading, or other document, is amended by leave of the court, it is to be expected that as part of the order granting leave to amend, the court will indicate whether the amended document requires proper basis certification. The absence of such an indication in a court order will not relieve a party from complying with the certification requirements of the Act.⁵⁹

⁵⁷ CPA s41(2)(a).

⁵⁸ CPA s42(1).

⁵⁹ PNCI 2-2011 par.18.

60. A proper basis certification is relevantly identical to the certificate required on filing originating process in the Federal Court.⁶⁰ Having a proper basis to commence or defend a proceeding is also an existing professional conduct requirement.⁶¹
61. In urgent cases such as an injunction or imminent expiry of a limitation period, court documents may be filed without the applicable certifications provided that they are filed as soon as practicable thereafter.⁶²
62. The failure to certify does not prevent the commencement of a civil proceeding, but may be taken into account in respect of any sanction – as to which see below.⁶³
63. The Supreme, County and Magistrates' Court have all amended their rules so as to prescribe forms for certification.
64. There may be a lacuna in respect of third party proceedings. The certificates need only be filed with the "*first substantive document*". A further proper basis certification must be filed on any "*significant amendments to the first substantive document*". On a strict reading therefore, neither an overarching obligations certificate nor a proper basis certificate need be filed on the commencement of a third party proceeding. It is clear however that the third party must file both certificates with its defence to third party proceeding.⁶⁴
65. In our view, a defendant should file a proper basis certificate upon the filing of a statement of claim on a third party notice. It is arguable that joinder of a third party is a "significant amendment" to the defence to the primary claim. Even if not, it is within the spirit of the CPA that a statement of claim accompanying a third party notice be delivered with a proper basis certification.

⁶⁰ *Federal Court Rules* O11 r1B.

⁶¹ *Victorian Bar Rules of Conduct* r32; *Law Institute of Victoria Professional Conduct Rules 2005* r16.1.

⁶² CPA s44.

⁶³ CPA ss45&6.

⁶⁴ We take the term "defence" in s3 of the CPA to include a defence to third party notice.

Certification requirements on commencement – federal courts

66. The CDRA requires an applicant who institutes civil proceedings in the Federal Court or Federal Magistrates' Court to file a genuine steps statement at the time of filing the application.⁶⁵ The genuine steps statement must specify the steps that have been taken to try to resolve the issues in dispute, or the reasons why no such steps were taken. Reasons may include urgency and whether safety or security of any person or property would have been compromised by taking such steps.⁶⁶
67. A respondent who is given a copy of a genuine steps statement filed by an applicant must file a genuine steps statement before the hearing date specified in the application.⁶⁷ The respondent's genuine steps statement must state either that the respondent agrees with the applicant's genuine steps statement, or set out any disagreement and the nature of that disagreement.⁶⁸
68. A lawyer acting for a person who is required to file a genuine steps statement must advise the person of the requirement, and assist the person to comply with the requirement.⁶⁹ We repeat our opinion, given above, that this may require translation or interpretation into the client's first language.
69. A failure to file a genuine steps statement does not invalidate the application or any response to the application.⁷⁰

⁶⁵ CDRA s6(1).

⁶⁶ CDRA s6(2).

⁶⁷ CDRA s7(1).

⁶⁸ CDRA s7(2).

⁶⁹ CDRA s9.

⁷⁰ CDRA s10(2).

Case management

70. The CPA permits a court to make any direction it considers appropriate *“for the purpose of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose”*.⁷¹ This includes:
- a) giving directions to ensure that the civil proceeding is conducted promptly and efficiently;
 - b) identifying at an early stage the issues involved in the civil proceeding;
 - c) deciding the order in which the issues in dispute will be resolved;
 - d) encouraging the parties to co-operate with each other, to settle the whole or part of the proceedings, or to use appropriate dispute resolution;
 - e) controlling the progress of the civil proceeding;
 - f) limiting the time for the hearing, including the number of witnesses, the time for examination, and the issues or matters that may be the subject of examination or cross-examination; and
 - g) considering whether the likely benefits of taking a particular step justify the cost.⁷²
71. There is also substantial power to define or resolve issues both pre-trial and during the trial.⁷³
72. Finally, there is power to order a legal practitioner acting for a party to prepare a memorandum setting out the estimated trial length; the estimated trial costs and disbursements; and if the memorandum is to be given to a party, the estimated costs that the party would have to pay to any other party if unsuccessful at trial. Such an order may be made at any time.⁷⁴

⁷¹ CPA s47(1); see also s9.

⁷² CPA s47(3).

⁷³ CPA ss48-9.

⁷⁴ CPA s50.

73. The Commercial Court of the Supreme Court has since its inception on 1 January 2009, been employing flexible case management techniques in an attempt to define and narrow issues in dispute.⁷⁵ In particular, a case management conference is commonly ordered.⁷⁶
74. It is arguable that many of the powers referred to in the CPA are already in the armoury of the courts, either expressly in court rules, or implicitly in their inherent power to control proceedings. The change brought about by the CPA is again, we think, one of emphasis. The intention of the CPA is to drive cultural change in thinking about, dealing with and disposing of litigation. The well worn track of leaving it to the parties to slug their way through the chapters of the rules (first pleadings, then particulars, then discovery, then interrogation) is to be discouraged. Instead, the courts are being asked to consider the issues in dispute and to take an interventionist role in the narrowing or resolution of those issues.
75. It is hard to see all of the options proffered by the CPA being fully utilised. The Magistrates' Court, for example, receives almost 70,000 civil filings per year.⁷⁷ Without significant additional resources, the full potential of the CPA is unlikely to be available in every case brought in the Magistrates' Court. The key however is flexibility – courts are empowered, or at least their powers are gathered in a single place, to deal with all types of cases from the mundane to the exceedingly complex, and to provide a process that aims to resolve the dispute in a manner that is just, efficient, timely and cost-effective.

⁷⁵ *Notice to Practitioners – Commercial Court*, 12 December 2008, par.19; *Commercial Court Notice to the Profession 8/2009 Alternative Dispute Resolution*.

⁷⁶ The purpose and conduct of a case management conference is explained in *Commercial Court Notice to the Profession 9/2009*.

⁷⁷ 65,617 civil complaints issued or filed in 2009-2010, a decrease of about 5% on previous years; see *Magistrates' Court of Victoria Annual Report 2009-2010*.

Documents and information

76. Discovery procedures and obligations have been altered. Discovery will now occur in accordance with the rules of court, or otherwise in accordance with any order or direction that the court considers necessary or appropriate.⁷⁸
77. The Supreme, County and Magistrates' Courts have each modified their rules to limit discovery to 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.⁷⁹
78. Discovery is not required if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is being given.⁸⁰ Nor is discovery required of multiple copies of documents.⁸¹
79. In making a reasonable search for documents to be discovered, a party may take into account:
- a) the nature and complexity of the proceeding;
 - b) the number of documents involved;
 - c) the ease of retrieving a document;
 - d) the significance of any document to be found; and
 - e) any other relevant matter.⁸²

⁷⁸ CPA ss54 & 55.

⁷⁹ Rule 29.01.1(3).

⁸⁰ Rule 29.01.1(4)(a).

⁸¹ Rule 29.01.1(4)(b).

⁸² Rule 29.01.1(5).

80. If a party does not make a reasonable search, then the party must include in its affidavit of documents a statement of the category or class of document not searched for, and the reason why the search was not conducted.⁸³
81. Notwithstanding the above the court may, by order, expand a party's obligation including specification of a document or class of documents to which the expanded obligation relates.⁸⁴
82. The CPA contains a power to order cross-examination on a discovery affidavit, if there is a reasonable basis for belief that a party may be misinterpreting the party's discovery obligations, or failing to disclose discoverable documents.⁸⁵
83. The effect of the new rules is to limit the much maligned *Peruvian Guano* test – documents which relate to any issue in the proceeding, or which may put a party on a chain of enquiry in respect of those issues – to those cases where an expanded discovery obligation is appropriate. Even then, expanded discovery is likely to be by reference to an identified document or an identified class of documents.
84. The obvious intent of the new rules is to cause parties to think about what documents are critical in the sense of affecting either side's case, whether positively or negatively, and to require the parties to discover only those documents. Whether this approach will reduce the reams of material often discovered will depend upon the approach that parties and their advisors take to the discovery obligation.
85. We see one difficulty with the new discovery regime. Discovery has always been a compulsive power. It forces parties to produce documents they otherwise would not want to show to any other person. The origins of the discovery obligation lie in the Courts of Chancery. It is an inquisitorial power, akin to a subpoena *duces tecum*. It was only after the

⁸³ Rule 29.04(2)

⁸⁴ Rule 29.05.2.

⁸⁵ CPA s57.

merging of equity and the common law by the *Judicature Acts* of 1873 that the common law courts “borrowed” the discovery power from their Chancery cousins and adopted it as their own.⁸⁶

86. The new test significantly narrows the compulsive element of the discovery power, because it gives the discoverer various discretions – which documents ‘adversely affect’ one’s own case? which documents support the other party’s case? what is the extent of a ‘reasonable search’? what documents are reasonably believed to already be in the other party’s possession? is there any significance in a marked copy of a document compared to an unmarked copy?
87. Under the former procedure, the discovering party was compelled to produce all relevant documents. It was for the inspecting party to decide what to make of the documents produced. It now seems that the parties are engaged in a common enterprise of collating the documents that respectively support and adversely affect each other’s position. The right to decide what is a “critical” document and what is not, is now shared between the parties.
88. Our concern is that, while this process may work well between two parties who though in dispute act towards each other in good faith, it will not work so well if one party wishes to conceal a document or has no interest in performing a search for a particular document. The inspecting party, not having any knowledge of the document and unable to pursue a ‘chain of inquiry’ as of right, may not even realise that a particular document or class of documents is missing. One would hope that such occasions are comparatively rare. The failure to discover the document would be in breach of the overarching obligations to the court, and would open up the possibility of the party being subject to sanction.

⁸⁶ See eg Cairns *The Law of Discovery* (1984) p1.

Summary judgment

89. A court may give summary judgment for the plaintiff or the defendant if the defence or claim (as the case may be) has no real prospect of success.⁸⁷
90. This test is to be contrasted with r23.01, which requires the pleading to fail to disclose a cause of action or answer, to be scandalous, frivolous or vexatious, or to constitute an abuse of process.
91. The test prescribed by the CPA is less stringent, and is equivalent to the test in the Federal Court.⁸⁸ It therefore involves a different enquiry to the “hopeless” or “bound to fail” test developed in respect of r23.01.⁸⁹ The words “no real prospect of success” do not need any amplification as they speak for themselves. The word “real” directs the court to “the need to see whether there is a realistic as opposed to a fanciful prospect of success.”⁹⁰
92. In *Matthews v SPI Electricity Pty Ltd (No 2)*, J Forrest J said that the principles relevant to an application for summary judgment under the CPA were:
1. If a court determines that a particular cause of action is hopeless or bound to fail, then it should be dismissed;
 2. A court may also dismiss a claim where it determines that it has no real prospect of success in the sense that such prospects are fanciful rather than realistic;
 3. The less complex the issue in a case then the easier it is for a court to take the view that such a proceeding is capable of being determined on summary judgment; and
 4. Whatever the test to be applied, the power to order summary dismissal of a claim must be exercised with care. This is particularly so where a case may involve issues of contested fact, or where its consequences may affect a large number of persons.⁹¹

⁸⁷ CPA ss60-63.

⁸⁸ *Federal Court Act 1976* s31A.

⁸⁹ *Matthews v SPI Electricity Pty Ltd (No 2)* [2011] VSC 168 at [19] per J Forrest J 10 May 2011, citing *Spencer v Commonwealth* (2010) 241 CLR 118.

⁹⁰ *Matthews*, citing *Swain v Hillman* [2001] 1 All ER 91 per Woolf LJ.

⁹¹ *Matthews* at [22], relying upon *Credit Suisse International v Ramot Plana OOD* [2010] EWHC 2759 per Hamblen J, and modified in light of the CPA and the Australian authorities.

93. A court may order that a civil proceeding go 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.⁹²
94. In *Wickstead v Browne*, Kirby P said:

Common experience teaches that it is usually more efficient and just to consider the viability of a cause of action when the facts said to support it are adduced and the suggested action can be judged with a full understanding of all relevant evidence. Testimony gives colour and content to the application and development of legal principle. That is why leave is usually required for an appeal from interlocutory orders. Appellate courts, including this Court, will usually require evidence to be adduced and a trial concluded before considering the application of the law to that evidence. Out of the detail of the evidence ultimately proved, affecting the relationship of the respondent and the appellant, may arise a finding of a duty of care which the common law of negligence would uphold.⁹³

Sanctions

95. The CPA empowers the Court to sanction a person who has contravened any overarching obligation.⁹⁴ This includes not only the parties, but also legal practitioners and (where appropriate) expert witnesses, insurers and litigation funders.
96. The sanctions include, but are not limited to:
- a) an order for payment of legal or other costs or expenses caused by the contravention;
 - b) any order that legal or other costs or expenses be payable immediately, and be enforceable immediately;

⁹² CPA s64.

⁹³ (1992) 30 NSWLR 1 at 5-6; cited with approval in *Victoria v Richards* [2010] VSCA 113 [8]; cited with approval and applied to s64 of the CPA in *Matthews* at [124].

⁹⁴ CPA s29(1).

- c) an order for compensation for any financial loss materially contributed to by the contravention, including penalty interest, no interest or reduced interest;
 - d) an order that the person take steps reasonably necessary to remedy the contravention;
 - e) an order that the person not be permitted to take specified steps in the proceeding;
 - f) any other order the court considers to be in the interests of any person prejudicially affected by the contravention of the overarching obligations.⁹⁵
97. An application for a sanction order must be made in the court in which the civil proceeding is or was being heard, and must be made prior to the finalisation of the civil proceeding.⁹⁶ There is power to extend time for the making of an application if the proceeding has been finalised.⁹⁷
98. In addition to the general powers set out above, the Court has specific powers to take into account and make orders in respect of:
- a) a failure to comply with a certification requirement;⁹⁸
 - b) a contravention of a case management direction;⁹⁹ and
 - c) a failure to comply with a discovery obligation or order, or conduct intended to delay, frustrate or avoid discovery of discoverable documents.¹⁰⁰
99. The CDRA provides that the Federal Court or Federal Magistrates' Court may take into account the failure to file a genuine steps statement, or the failure to take genuine steps, when performing functions or exercising powers in relation to civil proceedings before it.¹⁰¹ This includes an express power to consider those matters as part of any discretion to

⁹⁵ CPA s29(1).

⁹⁶ CPA s30.

⁹⁷ CPA s31.

⁹⁸ CPA s46.

⁹⁹ CPA s51.

¹⁰⁰ CPA s56(1).

¹⁰¹ CDRA s11.

award costs.¹⁰² If a lawyer is ordered to pay costs personally because of a failure of the lawyer's duties in respect of the genuine steps statement, then the lawyer may not recover the costs from their client.¹⁰³

100. A failure to act with professional competence does not require proof of gross negligence. The 'ordinary standard' of negligence will suffice.¹⁰⁴

101. In one recent case, solicitors filed an amended statement of claim shortly prior to trial which alleged unconscionable conduct by one defendant based upon a particular conversation. The plaintiff did not lead any evidence of that conversation, and counsel for the plaintiff conceded in closing submissions that the conversation did not occur. Despite this, the allegation was not withdrawn until closing submissions, at which time the proceeding against that defendant was dismissed. Counsel and solicitors for the plaintiff were jointly ordered to pay that defendant's indemnity costs of the proceeding.¹⁰⁵

102. In two recent cases of some notoriety, a firm of solicitors commenced two class actions in the name of lead plaintiffs without the plaintiffs' consent. The solicitors were driven by a commercial desire to 'get in first', and used the names of persons who had registered an interest in participating in the class actions but who had not agreed to act as lead plaintiffs. The solicitors were ordered (by consent) to pay the costs thrown away of the defendants. The solicitors were also referred to the Legal Services Commissioner for investigation.¹⁰⁶

103. There is no reason to think that these decisions would have been made any differently if the CPA had been applicable, and a breach of overarching obligations had been alleged against the practitioners.

¹⁰² CDRA s12(1)&(2).

¹⁰³ CDRA s12(3).

¹⁰⁴ *Guss v Geelong Building Society (in liq)* [2001] VSC 388 [13] per Ashley J; see also *Ridehalgh v Horsefield* [1994] Ch 205, 229-30 per Bingham MR.

¹⁰⁵ *Apollo 169 Management Pty Ltd v Pinfield Nominees Pty Ltd (No 2)* [2010] VSC 475 per Emerton J.

¹⁰⁶ *Matthews v SPI Electricity Pty Ltd (No 1)* [2011] VSC 167 per J Forrest J; *Cohen v State of Victoria (No 2)* [2011] VSC 165 per J Forrest J.

CONCLUSION

104. The CPA's overarching obligations are not new. They have existed for many years, either expressly in lawyers' conduct rules or the common law, or implicitly arising from a lawyer's retainer.
105. What is new is the creation of a statutory code as the single repository for those obligations. The code applies to the parties to civil disputes and those standing behind them as much as it does the lawyers.
106. The general effect upon civil lawyers is threefold:
- a) to drive cultural change in the approach to thinking about and engaging in civil litigation;
 - b) to implement 'best practice' as a minimum standard; and
 - c) to make lawyers, together with the Courts, responsible for efficient management of civil disputes.

Michael Heaton

Daniel Aghion

Chancery Chambers
25 May 2011