

Civil Procedure Act 2010 (Vic) Update

2 February 2011

The *Civil Procedure Act 2010 (Vic)* (**the Act**) heralds important legislative reform for civil proceedings conducted in the Supreme, County and Magistrates Courts, but not VCAT or the Federal court. It came into operation on 1 January 2011. All legal practitioners who practice in this area must read and come to terms with this legislation and the new obligations it imposes.

Overarching purpose and obligations

The Act introduces the new concepts of overarching purpose and obligations. They now apply to all civil proceedings commenced after 1 January 2011, or if proceedings have commenced before that date, then:

- the overarching purpose applies to that proceeding from the date of operation of the Act; and
- the overarching obligations apply if the Court has not begun to hear and determine the proceeding.

The **overarching purpose** of the Act is the just, efficient, timely and cost-effective resolution of disputes. The Courts will be required to give effect to this purpose in the way they go about interpreting and exercising their powers and functions in the conduct of civil proceedings.

Express reference is made to the public interest in early settlement of disputes, the efficient use of court time and resources, and minimising delay between commencement of proceedings and listing for trial.

Overarching obligations will apply to all parties, lawyers, insurers, funders and expert witnesses. These are obligations to:

- act honestly at all times (section 17);
- only pursue claims and defences that have a proper basis, on the factual and legal material available at the time (section 18);
- only take steps reasonably believed to be necessary to resolve the dispute (section 19);
- co-operate with other parties (section 20);
- not mislead and deceive (section 21);
- use reasonable endeavours to resolve a dispute by agreement (section 22) or narrow issues (section 23);
- use reasonable endeavours to ensure costs are reasonable and proportionate to the complexity or importance of the issues, and the amount in dispute (section 24);

- minimise delay (section 25); and
- disclose '**critical documents**' at the earliest reasonable time, and on a continuous basis after becoming aware of their existence (section 26). The Explanatory Memorandum describes '**critical documents**' as those that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as those the party knows will adversely affect their case.

Overarching obligations certification is required by each party to a proceeding with the filing of the first substantive document in civil proceedings commenced on or after 1 January 2011 (section 41).

If a practitioner is faced with instructions from a client that are inconsistent with the overarching obligations the practitioner cannot contravene, nor allow or cause the client to contravene the Act (section 13 and 14).

The Act therefore sets up a hierarchy of duties and obligations for practitioners as follows:

1. Duty to the court
2. Overarching obligations
3. Duty to the client

Pre-litigation requirements – for all proceedings commenced on or after 1 July 2011

There are also pre-litigation requirements that the Act says 'must' be observed (except in cases of urgency) – (sections 33 and 34). Certification, by way of a dispute resolution statement, that pre-litigation requirements have been met, must be filed with each party's first substantive document for all proceedings commenced on or after 1 July 2011 (section 43). This means pre-litigation requirements will have to be undertaken prior to 1 July 2011 for any proceedings that may be likely to be issued on or shortly after 1 July 2011.

Practitioners faced with a request to participate in the pre-litigation requirements of the Act prior to 1 July 2011 should give careful consideration to participating and advise their clients appropriately, otherwise they may find that proceedings are issued shortly after 1 July 2011 and they will have to justify to the court why the pre-litigation steps were not undertaken.

The pre-litigation requirements a person is required to undertake are to be assessed having regard to the person's situation and the nature of the dispute. The explanatory memorandum sets out situations such as a limitation period about to expire or a party terminally ill as reasons for not participating in pre-litigation requirements. The fact that a party thinks it is impractical to participate is not a sufficient reason.

The pre-litigation requirements are set out in section 34 and require each person to the civil dispute to **take reasonable steps to resolve the agreement or to narrow the issues in dispute before** proceedings are issued. Reasonable steps include:

- exchanging correspondence, information and documents; and
- any genuine and reasonable negotiations or other dispute resolution options.

While the legislation uses the word ‘must’ in relation to pre-litigation requirements, section 36 provides that proceedings may be commenced despite non-compliance with these requirements.

Each party is to bear their own costs of such steps, but the Court has power to award these costs if satisfied it is reasonable to do so (section 38). The Court may take failure to comply with pre-litigation requirements into account. Practitioners should warn their clients of this possible outcome where clients refuse to comply.

Proper basis certification

Practitioners will also have to certify that allegations, denials and non-admissions in pleadings have a **proper basis** on the factual and legal material available (section 42). This must be done when filing the first substantive document in a civil proceeding and any document that contains significant amendment to the first substantive document after 1 January 2011.

Privilege

While the pre-litigation requirements encourage free exchange of information with a view to obtaining a quick and appropriate outcome, nothing in the Act is intended to override the doctrine of privilege whether arising under common law, statute or otherwise (section 6).

Summary dismissal / judgment

The Court has the power to summarily dismiss a claim or give summary judgment for a plaintiff where the claim or defence has ‘*no real prospects of success*’ (section 61, 62). This is intended to liberalise the summary judgment procedure and so dispose of unmeritorious claims or defences.

Personal costs orders

Practitioners should be aware that the Court has powers to award costs against practitioners personally for:

- contravening an overarching obligation (section 29);
- behaving unreasonably and causing a party to unnecessarily incur costs in complying with pre-litigation requirements (section 38); and

- failing to comply with discovery obligations or engaging in conduct intended to delay, frustrate or avoid discovery of discoverable documents (section 56).

Practitioners should be aware that personal costs orders made against solicitors as a non-party to the proceeding attract a deterrent (double) excess under the LPLC policy.

Summary

This legislation will bring about a significant change in the way that many lawyers have previously practiced. A significant amount of investigation and assessment as well dispute resolution will need to be done before proceedings are issued, the costs of which will be unlikely to be recovered from the other parties.

Litigators need to ensure they read this new legislation carefully and spend time developing protocols to ensure that the obligations under the Act can be complied with. In particular, practitioners should update precedents and develop information packs for clients so that clients are fully informed on their obligations and the consequences of not complying.

Information is available to assist practitioners informing their clients at various websites:

- The Department of Justice website (www.justice.vic.gov.au) has a publication entitled '**Civil Procedure Act 2010: A brief introduction**'
- The Supreme Court website (www.supremecourt.vic.gov.au) has a document entitled '**Important information for people in a civil dispute**'.
- The County Court (www.countycourt.vic.gov.au) also has information available to download concerning the new litigation process.

Legal Practitioners' Liability Committee