

# CIVIL PROCEEDINGS HEADING FOR REFORM

New legislation in Victoria is designed to bring about cultural change in court proceedings.

The *Civil Procedure Act 2010* (Vic) heralds important legislative reform for civil proceedings conducted in the Supreme, County and Magistrates' Courts, but not the Victorian Civil and Administrative Tribunal.

It will come into operation on 1 June 2011 at the latest, but the courts expect it may come into operation as early as 1 January 2011. All legal practitioners who practise 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 will apply to all civil proceedings commenced after the Act comes into operation. 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 (s17);
- only pursue claims and defences that have a proper basis, on the factual and legal material available at the time (s18);
- only take steps reasonably believed to be necessary to resolve the dispute (s19);
- cooperate with other parties (s20);
- not mislead and deceive (s21);
- use reasonable endeavours to resolve a dispute by agreement (s22) or narrow issues (s23);

- use reasonable endeavours to ensure costs are reasonable and proportionate to the complexity or importance of the issues, and the amount in dispute (s24);
- minimise delay (s25); and
- disclose "critical documents" at the earliest reasonable time, and on a continuous basis after becoming aware of their existence (s26). 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.

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 (ss13 and 14). The Act therefore sets up a hierarchy of duties and obligations for practitioners as follows:

- duty to the court;
- overarching obligations; and
- duty to the client.

## Mandatory pre-litigation requirements

Sections 33 and 34 deal with pre-litigation requirements that "must" be observed (except in cases of urgency). This will apply to all proceedings commenced six months after the Act comes into operation – 1 December 2011 at the latest.

There is an obligation 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, s36 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 (s38). 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.

Parties or their lawyers must certify that pre-litigation requirements have been met at the time of filing the initiating process. 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 (s42).

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 (s6).

## 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" (ss61 and 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 (s29);
- behaving unreasonably and causing a party to unnecessarily incur costs in complying with pre-litigation requirements (s38); and
- failing to comply with discovery obligations or engaging in conduct intended to delay, frustrate or avoid discovery of discoverable documents (s56).

## Summary

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. Practitioners should start working now on educating clients in relation to the new obligations. ●

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