



LEGAL  
PRACTITIONERS'  
LIABILITY  
COMMITTEE

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## Avoiding personal costs: Getting the basics right

PRESENTERS

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## Introduction

The risk of personal costs orders has been a feature of the Victorian civil litigation landscape since the *Civil Procedure Act 2010 (Vic)*.

The seminal authorities, *Yara Australia* and *Hudsepth*, were decided more than nine years ago. Since then, there have been a number of decisions on personal costs orders, which contain insights about when they are likely to be ordered and how to avoid them.

This webinar will:

- provide an overview of the law relating to personal costs orders;
- consider a number of decisions relating to personal costs orders; and
- provide guidance about how to avoid them.

# Overview of the Law



## ***Civil Procedure Act 2010 (Vic)***

The CPA applies to all civil proceedings in the Supreme Court, County Court and Magistrates' Court.

However, the Act does not apply to VCAT.

Stated purpose includes expanding the powers of courts in relation to costs – section 1(2)(b).

However, section 65E of the CPA states that the powers conferred on Victorian courts under the Act in relation to costs do not derogate from their other powers, where conferred under the Supreme Court, County Court and Magistrates' Court Acts or pursuant to the inherent jurisdiction of the Supreme and County Courts.





## Part 2.3 of the CPA - Overarching obligations

- a. the paramount duty to further the administration of justice – section 16
- b. to act honestly – section 17
- c. to have a proper basis for any claim or defence – section 18
- d. to only take steps to resolve or determine the dispute – section 19
- e. to co-operate – section 20
- f. not to mislead or deceive – section 21
- g. to use reasonable endeavours to resolve the dispute – section 22
- h. to narrow the issues in dispute – section 23
- i. to ensure costs are reasonable and proportionate – section 24
- j. to minimise delay – section 25
- k. to disclose the existence of documents which are critical to the resolution of the dispute – section 26.

## Part 2.3 of the CPA - Overarching obligations

The OOs apply to legal practitioners and law firms, where they are acting for a party– section 10(1).

Sections 13 to 15 of the CPA specifically concern legal practitioners and the overarching obligations.

Section 13 states that the overarching obligations co-exist with a practitioner's duties to their client but prevail where a practitioner is instructed to act in a way which is inconsistent with the overarching obligations.

Section 14 imposes an obligation on legal practitioners to ensure that a client does not contravene an overarching obligation.

Finally, section 15 states that a legal practitioner's duty to the court overrides their compliance with the overarching obligations.

# Contravention of the Overarching Obligations

Where person has contravened an OO the court may order they pay some or all of the legal costs or expenses of any other person arising from such contravention – section 29(1)(a).

Sub-paragraphs (b) and (c) of section 29(1) address costs specifically.

Sub-paragraph (b) states that an order for legal costs may be payable and enforceable immediately.

Sub-section (c) states that an order for costs can include an order for penalty interest in respect of any delay in the payment of an amount claimed in the civil proceeding or an order for no interest or reduced interest.

An application for an order for costs for contravention of an overarching obligation must be made prior to the finalisation of the proceeding – section 30(2).

# Contravention of the Overarching Obligations

(continued)

However, pursuant to section 29(2)(b) the court can also order costs for contravention on its own motion.

Contravention of a direction or order of the court by a person to whom it concerns can result in the court directing (among various options) that the person pay the whole or part of the costs of another party or person – section 51(f) of the Act. This applies to legal practitioners as well as parties.

A court may make orders or directions arising from a failure to comply with discovery obligations, including an order against a legal practitioner who is responsible for, or aids and abets, that failure – section 56(2)(c).



# Supreme Court and County Court Rules

## Rule 63.23 / Rule 63A.23 – Cost liability of a lawyer

1. *Where a solicitor for a party, whether personally or through a servant or agent, has caused costs to be incurred improperly or without reasonable cause or to be wasted by a failure to act with reasonable competence and expedition, the Court may make an order that:*
  - a. *all or any of the costs between the solicitor and the client be disallowed or that the solicitor repay to the client the whole or part of any money paid on account of costs;*
  - b. *the solicitor pay to the solicitor's client all or any of the costs which the client has been ordered to pay to any party;*
  - c. *the solicitor pay all or any of the costs payable by any party other than the client.*
2. *Without limiting paragraph (1), a solicitor is in default for the purpose of that paragraph where any application in or trial of a proceeding cannot conveniently be heard or proceed, or fails or is adjourned without any useful progress being made, by reason of the failure of the solicitor to:*
  - a. *attend in person or by a proper representative;*
  - b. *file any document which ought to have been filed;*
    - (c) *lodge or deliver any document for the use of the Court which ought to have been lodged or delivered;*
    - (d) *be prepared with any proper evidence or account; or*
    - (e) *otherwise proceed.*
- (3) *The Court shall not make an order under paragraph (1) without giving the solicitor a reasonable opportunity to be heard.*
- (4) *The Court may, before making an order under paragraph (1), refer the matter to the Costs Judge or another Associate Judge for inquiry and report.*
- (6) *The Court may order that notice of any proceeding or order against a solicitor under this Rule be given to the client in such manner as the Court directs.*
- (7) *This Rule applies, with any necessary modification, to a barrister as it applies to a solicitor.*

## Rule 63.54

Applies to proceedings before the Costs Court and states as follows:

1. *This Rule applies where—*

*a party fails to apply to have costs taxed within a time fixed under Rule 63.53(1) and the failure is occasioned by the neglect or delay of the party's solicitor; or*

*in any proceedings before the Costs Court the solicitor for any party—*

2. *The Costs Court may—*

*order the solicitor to pay costs to any party in respect of the proceedings before the Costs Court;*

*refuse to allow the fees to which the solicitor would otherwise be entitled for drawing any bill or for any attendance before the Costs Court.*

# The *Civil Procedure Act* is a bit special...

*Yara Australia v Oswal* [2013] VSCA 337 at [17], [18] and [20]



## But perhaps not that special...

Part VB of the *Federal Court of Australia Act 1976* (Cth).


Section 37M of the FCAA relevantly states that:

- (1) *The overarching purpose of the civil practice and procedure provisions [largely defined to mean the Court Rules] is to facilitate the just resolution of disputes:*
  - (a) *according to law; and*
  - (b) *as quickly, inexpensively and efficiently as possible.*
  
- (2) *Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:*
  - (a) *the just determination of all proceedings before the Court;*
  - (b) *the efficient use of the judicial and administrative resources available for the purposes of the Court;*
  - (c) *the efficient disposal of the Court's overall caseload;*
  - (d) *the disposal of all proceedings in a timely manner;*
  - (e) *the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.*

Section 37N of the FCAA requires parties to act in accordance with the overarching purpose. The following sub-sections are particularly pertinent:

- (1) The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.*
- (2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:*
  - (a) take account of the duty imposed on the party by subsection (1); and*
  - (b) assist the party to comply with the duty.*
- ...*
- (4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).*
- (5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.*





Section 43 of the FCAA concerns costs and confers a wide power on the court to order costs. Specifically, section 43(3)(f) states that the court may order that a party's lawyer bear such costs personally.

Rule 40.07 of the Federal Court Rules provides that a party who has reasonable cause to believe that additional costs have been incurred because of the misconduct of their lawyer may apply to the court for an order as follows:

- a. *that the whole or part of the costs as between the lawyer and the party be disallowed; or*
- b. *if the lawyer is a barrister—that the whole or part of the costs as between the barrister and the barrister's instructing lawyer be disallowed; or*
  - (c) *that the lawyer pay to the party costs that the party has been ordered to pay to another party; or*
  - (d) *that the lawyer indemnify any other party against any costs payable by that party.*

Misconduct is proven where:

- (a) *a proceeding or an application is delayed, adjourned or abandoned because of the lawyer's failure:*
  - (i) *to attend or make arrangements for a proper representative to attend a hearing; or*
  - (ii) *to file a relevant document; or*
  - (iii) *to provide the Court or another party with a relevant document; or*
  - (iv) *to be prepared for a hearing; or*
  - (v) *to comply with these rules or an order of the Court; or*
  
- (b) *the lawyer:*
  - (i) *incurs costs improperly or without reasonable cause; or*
  - (ii) *incurs costs that are unnecessary or wasteful; or*
  - (iii) *is guilty of undue delay.*

Cf: ***Federal Circuit and Family Court of Australia Act 2021 (Cth)*** - sections 67 and 68 in relation to the Family Court and sections 190 and 191 in relation to the Federal Circuit Court.

***Dahler v Australian Capital Territory (No 2) [2014] FCA 1154*** – the court can order cost against a legal practitioner under rule 40.07 in the absence of an application by a party.

***Modra v State of Victoria [2012] FCA 240*** - the court can order costs against a legal practitioner irrespective of the operation of rule 40.07.

# Discussion of two Victorian cases

- *Gatto Corporate Solutions v Mountney* [2016] VSC 752 per Daly AsJ
- *Re Morgan* [2023] VSC 123 per McMillan J

**PRESENTER**

**Mark Brookes, Partner**



# ***Knight v FP Special Assets Ltd (1992) 174 CLR 178***

High court confirmation of the court's inherent jurisdiction.

An applicant must satisfy the court that:

- The case falls within a “*general category of case where a non-party costs order might be appropriately made*”.
- The interests of justice require that such order is made.

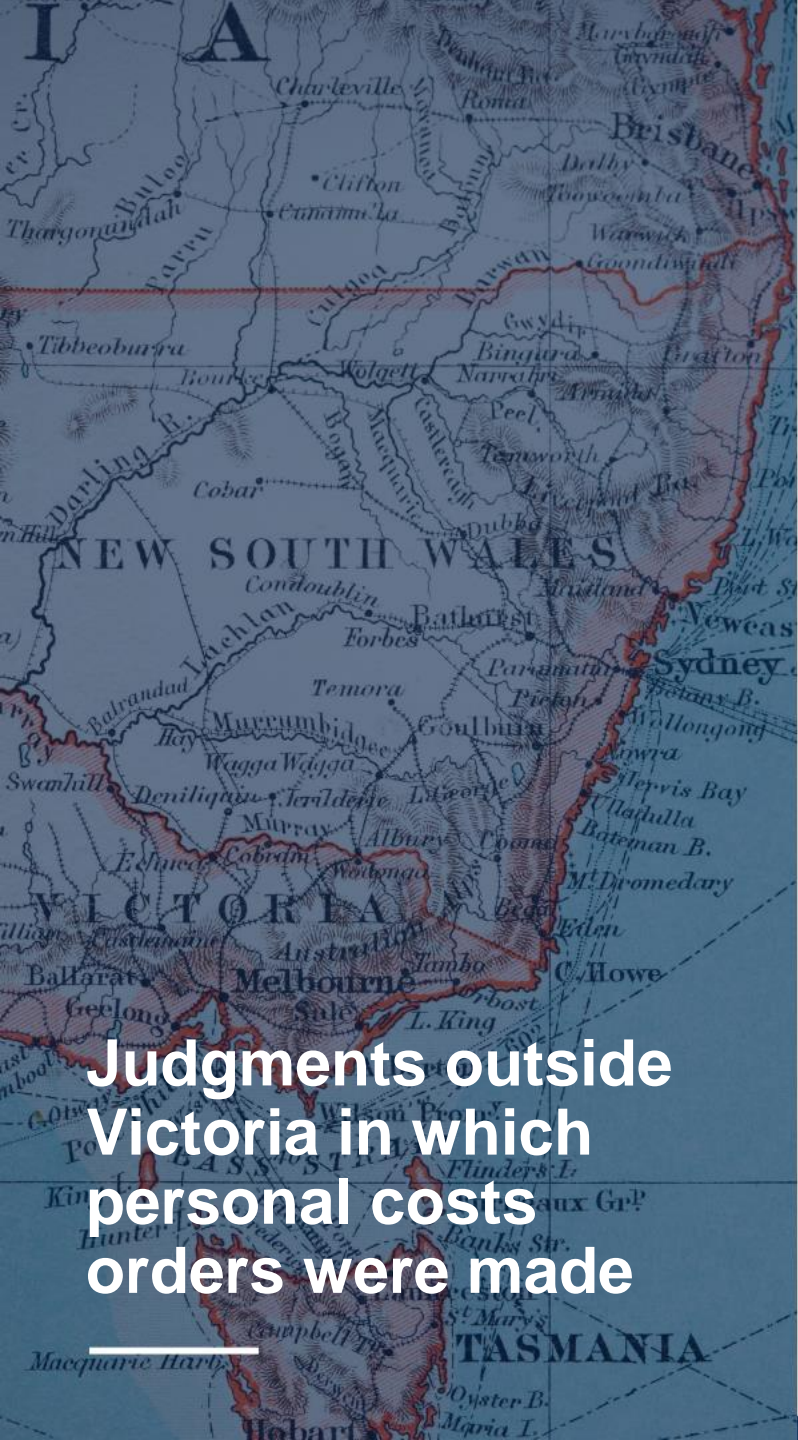
## Objectives of personal costs orders

Indemnify or compensate the opposing party or the lawyer's client.

Ensure that a litigant is not required to pay costs caused by the lawyer's dereliction of duty to the court.

Give confidence to the courts and litigants.

***Ridehalgh v Horsefield*** [1994]  
Ch 205: jurisdiction must be exercised with care and discretion and only in clear cases.



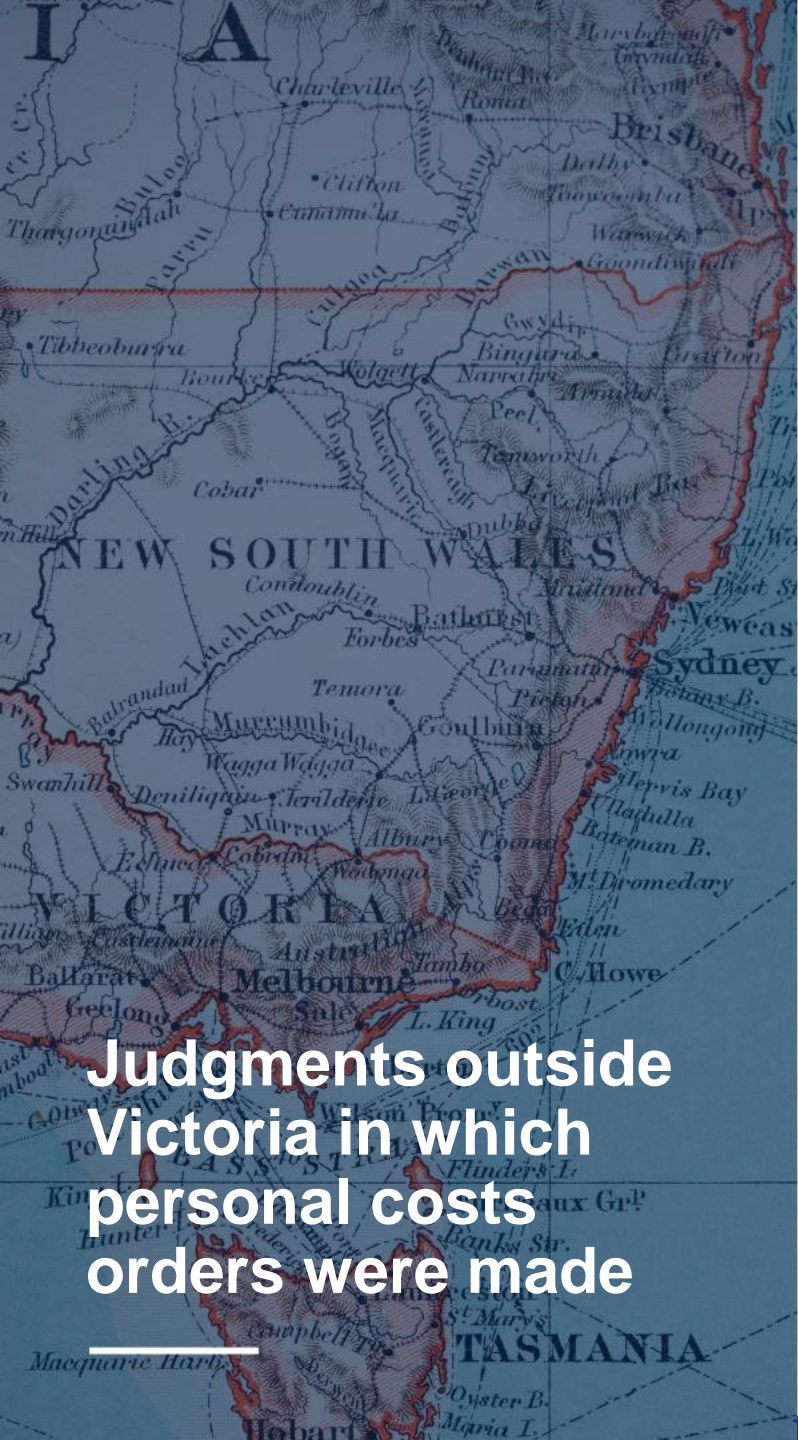
Making unsupported allegations, especially allegations of fraud:  
***White Industries v Flower & Hart* (1998) FCA 806.**

Commencement of proceedings without authority or instructions:  
***Zimmerman Holdings Pty Ltd v Wales* [2002] NSWSC 447.**

The importance of the **know your client** rule.

Judgments outside  
Victoria in which  
personal costs  
orders were made





Failure to fulfil procedural responsibility.

For example:

Failing to attend a hearing: ***SZEKQ v Minister for Immigration & Multicultural & Indigenous Affairs*** [2006] FMCA 390;

Wholly inadequate submissions/wasting the court's time: ***Kendirjian v Ayoub*** [2008] NSWCA 194.

Judgments outside  
Victoria in which  
personal costs  
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**Judgments outside  
Victoria in which  
personal costs  
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### ***Grealy v State of Queensland* [2022] QDC 231**

A subpoena was drafted in a way that was clearly objectionable, oppressive and unduly burdensome.

Serious dereliction of duty by continuing to oppose an application, where:

- no attempt to narrow the scope of the dispute;
- untenable arguments;
- compliance with the subpoena would necessitate adjournment of the trial.





Judgments outside  
Victoria in which  
personal costs  
orders were made

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***See Well Law Practice Pty Ltd v Barclay [2021] QDC 114***

- Applicant seemed “entirely unaware of the relevant law”.
- Reliance upon a large amount of irrelevant material.
- Serious allegations of fraud.
- Non-compliance with filing requirements.

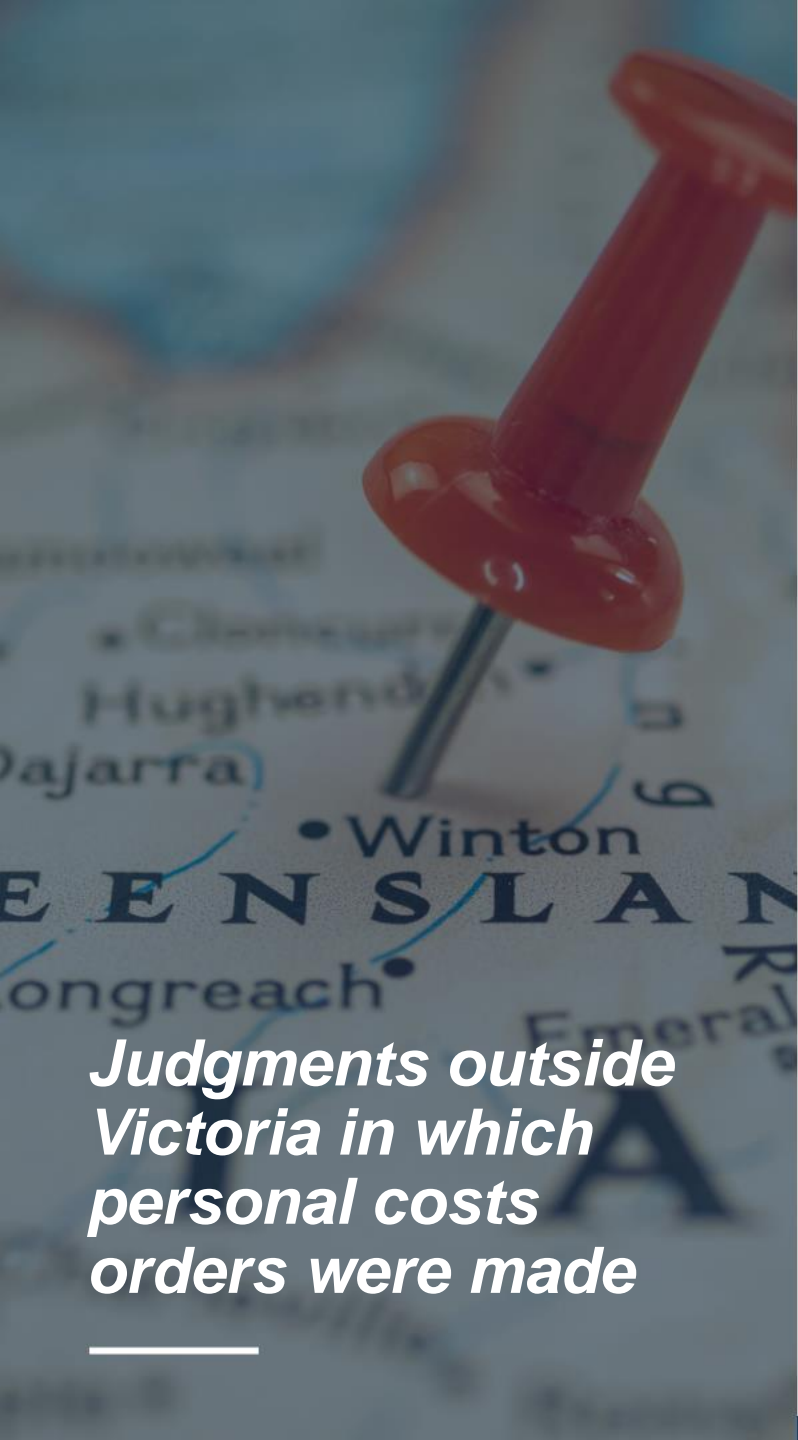


Judgments outside  
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***PJM v AML (No 2) [2018] QSC 204***

- No proper consideration as to the admissibility of evidence.
- Negligence and lack of care in preparation of affidavit material.
- Lack of proof of the basic elements of the claim.
- Unreasonable approach.



***Judgments outside  
Victoria in which  
personal costs  
orders were made***

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***Elliott Harvey Securities Ltd v Raynel [2015] QSC 212***

- Doomed to failure.
- Wilful disregard of the known facts or clearly established law.

***Campbell v Campbell [2012] QSC 302***

- Caveat maintained despite clear evidence that it should have been withdrawn.



**Judgments outside  
Victoria in which  
personal costs  
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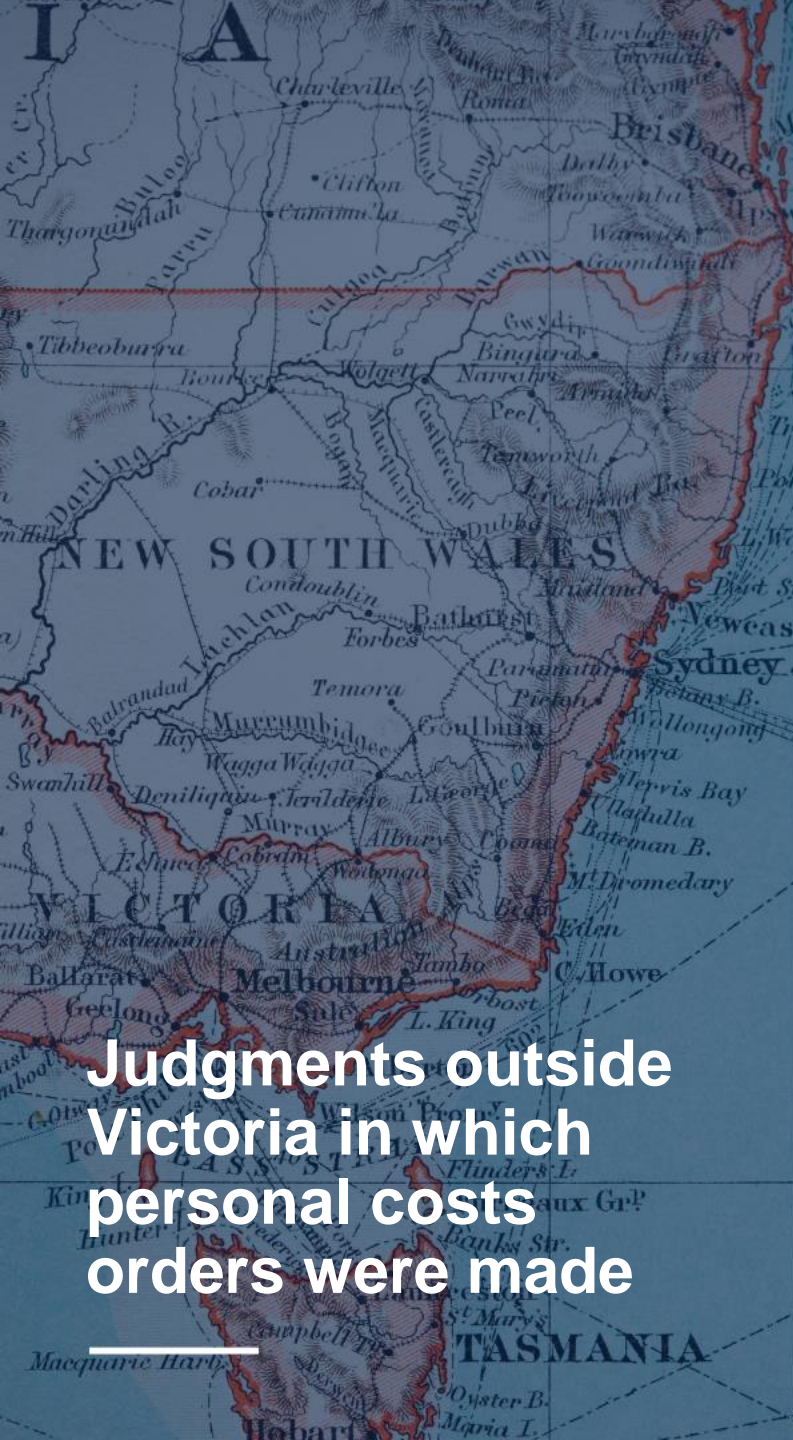
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***Prior v Queensland University of Technology (No 3) [2016] FCCA 3399***

- Complaint dismissed on the basis that it had no reasonable prospects of success.
- No personal costs order as:
  - Proceedings were not hopeless and bound to fail;
  - Not satisfied that the solicitor's certification of the points of claim was wrongfully or inappropriately given.

No reasonable prospects of success is distinguishable from hopeless and bound to fail.





**Judgments outside  
Victoria in which  
personal costs  
orders were made**

***Coulthard v SA* [2020] FCA 76**

- No considered advice regarding the strong likelihood that the application would fail.
- Did not inform client of communications from the State clearly setting out why the application would almost certainly fail.

***Nahata v Robinson (No2)* [2023] NSWSC 1297**

- The application was doomed to fail.
- Non-compliance with court orders and court rules.
- Serious dereliction of duty and serious misconduct.



## Conduct which does not give rise to a personal costs order

- Mere error or negligence: *Mauroux v Soc Com Abel Pereira da Fonseca SARL* [1972] 1 WLR 962.
- Failure on the merits – no reasonable prospects of success.
- Misconduct not sufficiently serious: *Young v Young* (1990) 75 DLR (4th) 46.



## Quantum

- Only to the extent that the lawyer's improper conduct has put a party at unnecessary or unreasonable costs.
- Nothing is added to mark the court's disapproval or by way of deterrence.
- Costs can be ordered on an indemnity basis.



## Summary and guidance

- Some inconsistencies and difficult to identify an exhaustive list due to subjective and discretionary elements.
- Orders are imposed sparingly.
- Something more than an error or negligence is required - hopeless and doomed to fail.
- An emphasis on misconduct and abuse of process.



## Summary and guidance – don't...

- Make allegations that are not supported by evidence, particularly fraud.
- Take steps without instructions (commencement of proceedings, settlements etc).
- Act where there is a conflict of interests.
- Pursue a client's or your own collateral purpose.
- Become emotionally involved – are you acting in your client's best interests?





## Summary and guidance – do...

- Know who your client is (or clients are) and who has authority to provide instructions.
- Comply with court rules and court orders - or have a satisfactory explanation for non-compliance.
- Always be courteous to the court and colleagues.
- Brief specialist counsel if warranted (but do not blindly rely on counsel).
- Ask for help.



# Our presenters

*Topic: Avoiding personal costs – getting the basics right*



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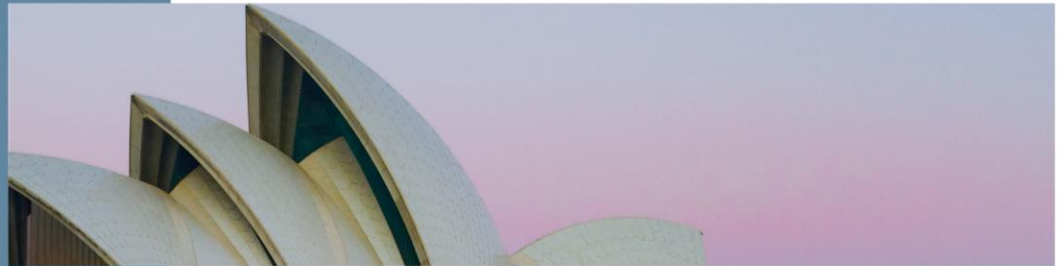
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