

**AN INTRODUCTION TO THE CIVIL PROCEDURE ACT 2010**

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# An Introduction to the *Civil Procedure Act 2010*

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## Introduction

1. The *Civil Procedure Act 2010* (Vic) (“the Act”) commenced on 1 January 2011. The Act aims to substantially reform the way litigation is conducted in the State of Victoria. Insight into its philosophy can be drawn from the Second Reading Speech of Attorney-General Hulls:

The Civil Procedure Bill 2010 will reform, modernise and unify the procedure for the conduct of civil litigation. Courts play an important role in adjudicating civil disputes and procedural rights and that role should, of course, continue. But as a public resource, courts must be used responsibly. Parties should not abuse their right of access to the courts by unnecessarily tying up court resources, thereby preventing others from accessing justice. A well-resourced litigant should not be able to use their power to play tactical games and draw out litigation until the other party is forced into an unfair settlement or withdraws. This bill will curtail such behaviour and arm the courts with the power to prevent such conduct.<sup>2</sup>

2. This legislation should be seen as both a shield and a sword for your clients to be used against a better resourced litigant. It also creates obligations for all parties, legal practitioners and law firms involved in civil litigation in Victoria – so you need to be aware of it. The purpose of this paper is to give a brief overview of some of the major concepts of the Act and identify some things which may directly affect your practice.

## Application of the Act

3. The Act “applies to all civil proceeding” (Section 4). ‘Civil proceeding’ is defined as “any proceeding in a court other than a criminal proceeding or quasi criminal proceeding.” There are some exceptions such as Intervention Orders (Section 4(2)) and, notably, VCAT (Section 4(3)). But generally the Act applies to all civil proceedings across the jurisdictions of the Magistrates’, County and Supreme Courts. There is also a provision which will permit the enactment of regulations which can prescribe that certain Acts be excluded from the operation of the Act (Section 4(4)).

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<sup>2</sup> Attorney-General Hulls ‘Second Reading: Civil Procedure Bill’ (Speech delivered at Parliamentary Assembly, Victoria, 24 June 2010)

### The Overarching Purpose

4. Section 7 of the Act provides, “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.”
5. There are numerous concepts within that ‘overarching purpose’ which will undoubtedly spawn case law, but I suggest it will be necessary for the legal practitioner to ask him or herself throughout the various stages of litigation whether the conduct of their matter and each step being taken (by both sides) is consistent with the ‘overarching purpose.’
6. The courts “must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers” (Section 8). Section 9 prescribes the things a court must have regard to in furthering the ‘overarching purpose’ although it may also have regard to other matters (Section 9(3)(b)).

### The Overarching Obligations

7. The ‘overarching obligations’ are the next major concept introduced by the Act. The ‘overarching obligations’ include:
  - (i) a “paramount duty to the court to further the administration of justice in relation to any civil proceeding” (Section 16);
  - (ii) to “act honestly at all times in relation to a civil proceeding” (Section 17);
  - (iii) to “not make any claim or make a response to any claim in a civil proceeding which is –
    - (a) frivolous; or
    - (b) vexatious; or
    - (c) an abuse of process; or
    - (d) 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” (Section 18);
  - (iv) to “not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding” (Section 19);

- (v) to “cooperate with the parties to a civil proceeding and the court in connection with conduct of that proceeding” (Section 20);
- (vi) to “not, in respect of a civil proceeding, engage in conduct which is –
  - (a) misleading or deceptive; or
  - (b) likely to mislead or deceive” (Section 21);
- (vii) to use reasonable endeavours to resolve a dispute by agreement if appropriate to do so, including by appropriate dispute resolution (Section 22);
- (viii) to narrow the issues in dispute (Section 23);
- (ix) to “use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceedings are reasonable and proportionate” (Section 24);
- (x) to “use reasonable endeavours in connection with the civil proceeding to –
  - (a) act promptly; and
  - (b) minimise delay.” (Section 25);
- (xi) to disclose the existence of relevant documents to the other party . (Section 26).

To whom do the ‘Overarching Obligations’ apply?

8. Relevantly, the ‘overarching obligations’ apply to any legal practitioner (Section 10(1)(b)) or any law practice (Section 10(1)(c) acting for or on behalf of a party “in respect of the conduct of any aspect of a civil proceeding in a court” (Section 11).
9. The ‘overarching obligations’ also apply to –
  - (i) any person who is a party (Section 10(1)(a));
  - (ii) “any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding” (Section 10(1)(d)).
  - (iii) any expert witness (except the overarching obligations in sections 18, 19,22 and 26) (Section 10(3)).

The ‘overarching obligations’ do not apply to lay witnesses (Section 10(2)).

### Sanctions for Contravening the Overarching Obligations

10. A Court, in exercising any power in relation to a civil proceeding, can take into account any contravention of the ‘overarching obligations’ (Section 28(1)). Of course, any contravention can be highly relevant on the question of costs (Section 28(2)). If satisfied, on the balance of probabilities, a contravention has occurred a court may make any order it considers in the interest of justice, including (but not limited to) an order:

- (i) the person pay some or all legal costs or other costs arising from the contravention;
- (ii) legal costs or other costs be payable immediately;
- (iii) the person compensate for any financial or other loss materially contributed to by the contravention;
- (iv) the person take reasonable steps to remedy the contravention;
- (v) the person not be permitted to take specific steps in the civil proceeding;
- (vi) anything it considers to be in the interests of any person who has been prejudicially affected by the contravention (Section 29 (1)(a) – (f)).

I note all of these sanctions can be made specifically against a legal practitioner or firm. Along with the parties “any other person who, in the opinion of the court, has sufficient interest in the proceeding” may make an application for relief (Section 29(2)). An application pursuant to s 29 is to be in accordance with the court rules (Section 30).

### Conflicts Between the Overarching Obligations and other Obligations, including those to the Client

11. Subject to the paramount duty, if there is an inconsistency between the overarching obligations and:

- (i) any legal obligation;
- (ii) contractual obligation; or
- (iii) other obligation the person may have

the overarching obligations prevail to the extent they are inconsistent (Section 12).

12. The Act also specifically addresses the conflict a legal practitioner may have between his or her obligation to a client and the ‘overarching obligations.’ It is necessary to reproduce this provision in full. Section 13 provides:

- (1) The overarching obligations do not override any duty or obligation of a legal practitioner to a client, whether arising under the common law or by or under any statute or otherwise, to the extent that those duties and obligations and the overarching obligations can operate consistently.
- (2) Despite subsection (1), a legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must comply with the overarching obligations despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.
- (3) In the case of any inconsistency between any overarching obligation and a duty or obligation referred to in subsection (1) or an instruction or a wish referred to in subsection (2) –
  - (a) the overarching obligation prevails to the extent of that inconsistency; and
  - (b) in the case of the instruction or wish of a client, the legal practitioner is not required to comply with any instruction or wish of the client which is inconsistent with the overarching obligation.

13. This is obviously a significant change to the previous position and is designed to reform the way litigation is conducted. The Attorney-General described the shift in this way:

This bill makes clear the fundamental ethical obligations of lawyers in conducting litigation, especially their duties to the court. It will assist them in resolving tensions between such duties and the demands of overzealous clients by also bringing clients and those who fund litigation within the orbit of the overarching obligations.

The court will be able to impose penalties for breach of the overarching obligations. In deciding if a sanction for non-compliance is appropriate, the court will be required to take into account whether or not a party has had legal representation.

A lawyer may be required to personally bear any costs order made by the court for breach of the obligations, and an order may be made that those costs are payable immediately and enforceable immediately.<sup>3</sup>

14. Section 13 squarely places on the legal practitioner and law firms a requirement to further the ‘overarching obligations’ and removes the defence of simply “acting on instructions.” Again, I suggest the legal practitioner will be required to ask themselves whether their instructions are consistent with the overarching purpose and obligations.

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<sup>3</sup> Attorney-General Hulls, ‘Second Reading: Civil Procedure Bill’ (Speech delivered at Parliamentary Assembly, Victoria, 24 June 2010)

15. If they are not, the legal practitioner or law firm must not act on those instructions. A legal practitioner or law practice must not cause a client to contravene the overarching obligations (Section 14). A legal practitioner's obligation to the court remains (Section 15).

### Certification Requirements

16. Each party must personally certify they have read and understood the overarching obligations and paramount duty (Section 41(1). Certification is to be in accordance with the rules of the particular court and filed with the first substantive document (Section 41(2). 'Substantive document' is defined in the Act and essentially covers pleading documents and, notably, excludes an application or summons and affidavits (Section 3).
17. In addition to the party's certification requirements a legal practitioner also has obligations. On the filing of the first substantive document or any document significantly amending the first document, a legal practitioner must also certify that on the facts and legal material available –
  - (i) each allegation of fact has a proper basis;
  - (ii) each denial has a proper basis; and
  - (iii) there is a proper basis for any non-admission. (Section 42(1)(a) – (c)).
18. Again, the certification is to be in accordance with the rules of the particular court. In determining whether or not an allegation or a denial has a proper basis, the practitioner's determination "must be based on a reasonable belief as to the truth or untruth of the allegation or denial" (Section 42(3)(a)). In respect of any non-admission, the proper basis determination by the legal practitioner "is that the legal practitioner does not know, and therefore cannot say, whether a fact alleged or denial is true or untrue" (Section 42 (3)(b)).
19. If a document must be filed urgently then it can be filed without the certification. But it should be filed as soon as practicable afterwards (Section 44). It is worth noting, a civil proceeding may still be commenced without certification (Section 45) but there may be consequences down the track. For example, normally a court normally won't make an order for summary judgment unless the appropriate certification requirements have been met.
20. Moreover, the court may take into account non compliance in making –
  - (i) any costs order;
  - (ii) any procedural order; or

- (iii) any other order it considers appropriate (Section 46 (a) – (c)).

### Disclosure and Discovery

- 21. Discovery is to be in accordance with the rules of the court unless otherwise ordered (Section 54) Section 55(1). provides a court may make any order or direction regarding discovery which “it considers necessary or appropriate.” The types of orders or directions are not limited but the Act outlines some of the orders or directions which a court may make (Section 55(2) & (3)).
- 22. A court may order sanctions if it finds there has been:
  - (i) a failure to comply with discovery obligations;
  - (ii) a failure to comply with any order or direction of the court regarding discovery; or
  - (iii) conduct intended to delay, frustrate or avoid discovery of discoverable documents (Section 56 (1)).
- 23. A deponent of an Affidavit of Documents may be cross-examine another party if “there is a reasonable basis for the belief that the other party may be –
  - (a) misinterpreting the party’s discovery obligations; or
  - (b) failing to disclose discoverable documents” (Section 57)
- 24. The rules of the Magistrates’, County and Supreme Court’s have been amended and now reflect a narrowed test for discovery and effectively limit “what documents are discoverable to those that *directly* advance or damage a case.”<sup>4</sup>

### Summary Judgment

- 25. A court may order summary judgment for a plaintiff or a defendant in any civil proceeding if satisfied a claim, defence or counterclaim or part thereof, has “no real prospect of success” (Section 63) This is a liberalisation of the former test for summary judgment and should mean more cases can be dismissed summarily. It remains to be seen whether this will be the practical effect and courts may take a cautious approach.<sup>5</sup> In practice it still appears the courts are reluctant to lock parties out of proceedings. Again, the rules of the Supreme, County and Magistrates’ Courts have been amended to reflect the new test.

### Other Things Dealt with in the Act

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<sup>4</sup> Judicial College of Victoria, ‘Civil Procedure Bench Book’, at 6.2

<sup>5</sup> Judicial College of Victoria, ‘Civil Procedure Bench Book’, at 7.1

- Case Management (Part 4.2)
- Appropriate Dispute Resolution (Chapter 5)
- Rules of Court and Regulations (Part 6.1)
- Transitional Provisions (Part 6.2)

### Conclusion

26. The Act attempts to reform civil litigation and can be seen as a natural progression from the continued focus on alternative dispute resolution and cases such as *Aon*<sup>6</sup> in the sense that there has been an overt acknowledgement by the Parliament and Courts things need to change and court time is precious. It is still early days and it remains to be seen how the various jurisdictions apply the Act. What is certain, however, is that the Act imposes obligations on legal practitioners and law firms which they need to be aware of; both in their clients' interests and their own.

### Other Resources

- 'Civil Procedure Bench Book' available on the Judicial College of Victoria website - [www.judicialcollege.vic.edu.au](http://www.judicialcollege.vic.edu.au)

For those not familiar with the Judicial College of Victoria, it, inter alia, produces publications for the judiciary and some of these are available on their website. As they are produced for the judiciary they can be very persuasive in court.

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<sup>6</sup> *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27