



**LITIGATION
AND
DISPUTE
RESOLUTION**

OVERVIEW

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OVERARCHING OBLIGATIONS

16	paramount duty to the court to further the administration of justice in relation to any civil proceeding
17	act honestly
18	must not make any claim or make a response to any claim in a civil proceeding that—(a) is frivolous ; or (b) is vexatious ; or (c) is 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 .
19	For the purpose of avoiding undue delay and expense, must 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
20	must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.
21	must not, engage in conduct which is— (a) misleading or deceptive ; or (b) likely to mislead or deceive.
22	must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution , unless— (a) it is not in the interests of justice to do so; or (b) the dispute is of such a nature that only judicial determination is appropriate.
23	If you cannot resolve a dispute wholly by agreement, use reasonable endeavours to— (a) resolve by agreement any issues in dispute which can be resolved in that way; and (b) narrow the scope of the remaining issues in dispute—unless—(c) it is not in the interests of justice to do so; or (d) the dispute is of such a nature that only judicial determination is appropriate
24	must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—(a) the complexity or importance of the issues in dispute; and (b) the amount in dispute.
25	For the purpose of ensuring the prompt conduct of a civil proceeding , must use reasonable endeavours to- (a) act promptly; and (b) minimise delay .
26	must disclose to each party the existence of all documents that are, or have been, in that person 's possession, custody or control— (a) of which the person is aware; and (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute . Disclosure must occur at— (a) the earliest reasonable time after the person becomes aware of the existence of the document; or (b) such other time as a court may direct.
	CONSEQUENCE OF BREACH

	In exercising any power in relation to a civil proceeding a court may take into account any contravention of the overarching obligations .
28	If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice (including costs against the lawyer, charging interest re any delay, remedy
29	the contravention...)

S 7 CPA: Overarching purpose to facilitate the just, efficient, timely & cost-effective resolution of real issues in dispute.

TOPIC 1 – DISPUTES AND THE CIVIL JUSTICE SYSTEM

A. WHAT IS THE CIVIL JUSTICE SYSTEM? WHAT ARE ITS OBJECTIVES?

- Goals of civil procedure in Victoria (rule 1.14):
 - In exercising any power under these Rules, the Court shall endeavour to ensure that all questions in the proceeding are determined:
 - effectively;
 - completely;
 - promptly; and
 - economically.

D. CASE MANAGEMENT

- For many years the attitude in *Queensland v JL Holdings Pty Ltd (1997)* prevailed:
 - *while case management principles were a relevant consideration, they could not be used to prevent a party from litigating an issue which was fairly arguable.*
 - *A party should be permitted to raise an arguable defence (even when made late) provided any prejudice to other parties could be compensated by costs.*
- But more recently **AON RISK SERVICES AUSTRALIA LTD v ANU (2009) 258 ALR 14**
 - The High Court expressly overruled the *JL Holdings* decision.
 - Courts now give less weight to the notion of the adversarial system which leaves the conduct of litigation to the parties.
 - Courts must now take **an active role** in reducing costs and delay.
 - Joint judgment (Gummow, Hayne, Crennan, Kiefel and Bell JJ) [177] – *‘It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings’*
- Judicial role & case management:
 - More managerial judicial role emerging
 - Case management - court involved in management of the progress of proceeding from commencement to conclusion
 - Case management is a shift away from the adversarial model
 - About fairness between the parties / and efficient use of scarce public resources (courts)
- Remember – our civil justice system is an adversarial system
 - Litigation is traditionally controlled by the parties
 - Parties determine the evidence to be presented to court at trial
 - Parties select issues to be determined
 - But it’s a publicly subsidised system!
- ALRC review of adversarial system of litigation –
 - Describes a managerial judge as: *“not simply responding as a **passive umpire** to processes initiated by litigants and their lawyers but is **active** in investigating the best way to define the dispute and to present the case ... The focus of dispute resolution is no longer solely directed towards the **final hearing**. Rather, legal proceedings are viewed as*

a continuous series of meetings, hearings and written communications during which evidence is introduced, witnesses heard and motions made.”

- **SCR**
 - Note r1.14 above
 - R2.01 – non-compliance allows the court to set aside the proceeding or any step taken
 - R2.04 – court may dispense with compliance with any of these requirements

H. REFORM OF THE CIVIL JUSTICE SYSTEM

- The Productivity Commission Report into Access to justice arrangements 3 December 2014
 - **Key Points**
 - There are widespread concerns that Australia’s civil justice system is too slow, too expensive and too adversarial.
 - But the notion of a civil justice ‘system’ is misleading.
 - Parties can resolve their disputes in many ways, including through courts, tribunals and ombudsmen.
 - Each differs in its (access issues of) formality, cost and timeliness.
 - Such a complex system resists both a single diagnosis and remedy.