

# CIVIL PROCEDURE

## ANSWER GUIDES

|   |    |
|---|----|
| OVERARCHING OBLIGATIONS / PURPOSE                                     | 2  |
| CASE MANAGEMENT POWERS  | 6  |
| CAPACITY & STANDING TO SUE  | 7  |
| JURISDICTION  | 8  |
| CROSS-VESTING JURISDICTION –  | 9  |
| COMMENCING PROCEEDINGS  | 10 |
| WRIT: <a href="#">R 4.01 (FORM 5A)</a>                                | 11 |
| ORIGINATING MOTION: <a href="#">R 5.02 (FORM 5B-5E)</a>               | 14 |
| SERVICE   | 15 |
| SERVICE OUTSIDE JURISDICTION  | 17 |
| APPEARANCE: <a href="#">ORDER 8</a>                                   | 19 |
| JOINDER OF CLAIMS / PARTIES   | 21 |
| ADDITION, SUBSTITUTION AND REMOVAL OF PARTIES: <a href="#">R 9.06</a> | 23 |
| RES JUDICATA & ISSUE ESTOPPEL   | 24 |
| PLEADINGS   | 25 |
| SUMMARY DISPOSITION   | 32 |
| AMENDMENT   | 37 |
| DISCOVERY: <a href="#">ORDER 29</a>                                   | 41 |
| DISCOVERY PRIOR TO SUIT   | 46 |
| COSTS   | 48 |
| TRIAL PROCESS   | 55 |

## STEPS TO ANSWER ALL QUESTIONS

- Say what the **ISSUE** is - 2/10 marks
  - E.g. was service effective?
  - Can amendment be allowed?
  - Can there be a correction for mistake of party?
- State the **RELEVANT RULE/S**
  - State **ELEMENTS** of the rule
  - How has the rule been **INTERPRETED** by the courts
  - Use **CASES**
- **APPLY RULE** to the facts
  - Use **CASES**

## OVERARCHING OBLIGATIONS / PURPOSE

### STEP 1: Outline OVERARCHING PURPOSE: s 7

**Purpose** = to facilitate the **JUST, EFFICIENT, TIMELY AND COST-EFFECTIVE** resolution of the real **ISSUES IN DISPUTE**

- (a) Hence, the court **MUST** have regard to the most efficient, effective and cost-efficient disposition in **ALL PRE-TRIAL ISSUES: s 7; AND**
- (b) Court must seek to **GIVE EFFECT TO THE OVERARCHING PURPOSE** in the **EXERCISE** of any of its **POWERS**, or in the **INTERPRETATION** of those powers as a part of the court's inherent, implied or statutory jurisdiction: **s 8**

**ALSO if one party has NOT followed any overarching obligations –**

- (c) In making **ANY ORDER** or giving **ANY DIRECTION** in a civil proceeding, a court shall further the overarching purpose by having regard to ... the degree to which each person has **COMPLIED** with the overarching obligations: **ss 9(1) + 9(2)(e)**

### STEP 2: Outline PARAMOUNT DUTY: s 16

**Section 16:** Each person to whom the overarching obligations apply [aka **EACH PARTY**] has a **paramount duty to the court to FURTHER THE ADMINISTRATION OF JUSTICE** in relation to any civil proceeding in which that person is involved, including, but not limited to—

- (a) any **INTERLOCUTORY application or proceeding**;
- (b) any **APPEAL** from an order or a judgment in a **CIVIL** proceeding;
- (c) any appropriate **DISPUTE RESOLUTION** undertaken in relation to a **CIVIL** proceeding.

Applies to **LAWYERS, CLIENTS, CLIENTS' LAWYERS, CLIENTS' LEGAL PRACTICE, EXPERTS**, and **OTHERS** who have an interest in litigation: **s 10**

### **STEP 3: OVERARCHING OBLIGATIONS: ss 17-26**

Applies to **LAWYERS, CLIENTS, CLIENTS' LAWYERS, CLIENTS' LEGAL PRACTICE, EXPERTS, and OTHERS** who have an interest in litigation: **s 10**

Parties to a proceeding have a number of overarching obligations they must follow.

- Obligations in **ss 16-26** are intended to make all participants accountable for the just, efficient, timely and cost-efficient resolution of disputes.

Duties include the duty to –

#### **ACT HONESTLY: s 17**

Person to whom overarching obligations apply must **ACT HONESTLY** at all times in relation to a civil dispute: **s 17**

#### **Not make claim / defence unless it has 'PROPER BASIS': s 18**

Person to whom overarching obligations apply **MUST NOT** make any claim which:

- is **FRIVOLOUS**;
- is **VEXATIOUS**;
- is an **ABUSE OF PROCESS**; or
- does not, on the **FACTUAL and LEGAL MATERIAL** available to the person at the time of making / responding to the claim, **have a PROPER BASIS**
  - If person wants to file a **CLAIM or DEFENCE**, the allegations upon which those are based **MUST HAVE A FACTUAL FOUNDATION**
  - Not a new requirement, but **s 18** creates now a clear obligation on counsel and lawyers when drafting pleadings

#### **Reasonable belief that step NECESSARY: s 19**

Person must not take a step in connection with a dispute **UNLESS** that person **REASONABLY BELIEVES** that step is **NECESSARY** to **FACILITATE THE RESOLUTION or DETERMINATION OF THE DISPUTE: s 19**

- Obligation there for the purpose of avoiding undue delay and expense: **s 19**

#### **COOPERATION: s 20**

Person must **COOPERATE** with the parties to a civil proceeding **AND** with the court in connection with the conduct of the proceeding: **s 20**

#### **Not MISLEAD or DECEIVE: s 21**

Must not engage in misleading and deceptive conduct; **s 21(a) OR**

**OR** conduct **LIKELY** to mislead or deceive: **s 21(b)**

- Applies **WHETHER OR NOT** it was **INTENTIONAL**.

Examples:

- **WITHHOLDING** information or docs
- **WASTE COURT'S TIME** with irrelevant arguments, unmeritorious claims or tediously-worded arguments
- One party **FAILS to BRING ALL AUTHORITIES TO ATTENTION** of court or judge
- **CONCEALING / MISLEADING facts**
- Knowingly permitting client to **DECEIVE COURT**
- **COACHING or PRESSURING witness** to give particular evidence

**REASONABLE ENDEAVOURS to settle: s 22**

A person to whom the overarching obligations apply must use **REASONABLE ENDEAVOURS TO RESOLVE A DISPUTE BY AGREEMENT** between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

- it is **NOT** in the interests of justice to do so; or
- the dispute is of such a nature that **ONLY JUDICIAL DETERMINATION** is appropriate.

**NARROW ISSUES in dispute: s 23**

If person **CANNOT RESOLVE** a dispute wholly **BY AGREEMENT**, the person must use **REASONABLE ENDEAVOURS** to—

- resolve by agreement **any issues in dispute which CAN be resolved in that way**; and
- **NARROW THE SCOPE** of the **remaining issues** in dispute

**UNLESS –**

- it is **NOT** in the interests of justice to do so; or
- the dispute is of such a nature that **ONLY** judicial determination is appropriate

**Ensure costs are REASONABLE and PROPORTIONATE: s 24**

A person must use **REASONABLE ENDEAVOURS** to ensure that legal costs and other costs incurred in connection with the civil proceeding are **REASONABLE AND PROPORTIONATE** to—

- the **COMPLEXITY or IMPORTANCE** of the issues in dispute; and
- the **AMOUNT** in dispute.
  - Courts undertake a **balancing act**
  - Look at costs incurred and the complexity and importance of the issues raised in litigation

Examples:

- Employing senior QCs instead of junior lawyers
- Large amount of material that is unnecessary and excessive provided to the court
- Unduly technical and costly disputes about non-essential issues
- Spending lots of money on a small claim

**MINIMISE DELAY: s 25**

A person must use **REASONABLE ENDEAVOURS** in connection with the civil proceeding to—

- act **PROMPTLY**; and
- **MINIMISE DELAY**.
  - For the purpose of ensuring the prompt conduct of a civil proceeding: **s 25**

**DISCLOSE existence of documents: s 26**

**Section 26(1):** A person 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**.

Must disclose at the **EARLIEST REASONABLE TIME** after the person becomes **AWARE** of the existence of the document; OR such other time as a court may direct: **s 26(2)(a)-(b)**

**HOWEVER –**

**DOES NOT APPLY** to documents **PROTECTED** from disclosure:

- **on the grounds of PRIVILEGE** which has not been expressly or impliedly waived; or
- **UNDER ANY ACT** (including any Commonwealth Act) or other law.

Overarching obligation of disclosure is a **BROAD, ONGOING obligation** that is designed to **facilitate the EARLY RESOLUTION of disputes: s 26(4); *Hodson v Amcore Ltd***

- Purpose of **s 26** is to accord with **s 7** – getting cases resolved quickly and cost-effectively etc. If party has critical doc on which they'll base their case, disclose this and **hopefully prompt settlement negotiations**.

Documents disclosed can **ONLY** be used for the purpose of **THAT LITIGATION: s 27**

#### **STEP 4: Have any overarching obligations been BREACHED?**

If so, **WHAT section / obligation?** See above

If **YES** –

#### **STEP 5: SANCTIONS: ss 28-29**

**Sections 28 & 29** are consequence to a party who breaches the obligations. They provide a powerful and valuable tool so court can exert **GREATER CONTROL** over the conduct of the parties

**Section 28:** Court in making any order may take into account any **CONTRAVENTION** of overarching obligations

**Section 29:** Court can make any orders it considers appropriate **IF** satisfied that, on a **BALANCE OF PROBABILITIES**, a person has **CONTRAVENED any overarching obligation: s 29**

Includes –

- Order as to costs (usual order) – in some instances can even order indemnity costs.
- Can make any order it considered appropriate in the interests of justice
- Court has power to order compensation to the other party or any other person.

— See cases p. 21

# CASE MANAGEMENT POWERS

Case management powers are contained **in ss 47-53** of the *Civil Procedure Act*

## **Active case management: s 47**

- Must proactively manage cases to ensure they are conducted in accordance with overarching purpose

## **INCLUDES - Directions hearings: s 47(3)**

- Court may actively case manage civil proceedings by **giving directions** to ensure the proceeding is conducted promptly and efficiently: **s 47(3)**
- **s 47(3)(b)** Court may actively manage proceedings by identifying at an early stage the issues to be determined in a civil proceeding
- **s 47(3)(c)** Decide the order in which the issues are to be resolved
- **s 47(3)(e)** Control the progress of the civil proceeding including but not limited to fixing timetables, dealing with as many aspects of a civil proceeding as it can,
- **s 47(3)(f)** Limiting the time for the hearing or any part of a civil proceeding. Limiting number of witnesses. Limiting time of examination or cross-examination. Limiting the issues.

## **Powers over pre-trial procedures: s 48**

- May order or give directions as to pre-trial steps including conduct of proceedings, timetable or timelines for matter to be dealt with, orders regarding ADR.
- May make an order requiring parties to attend case management conference. May make an order defining the issues.

## **Power over trial procedures and hearing: s 49**

**Section 49(3):** Court may give direction or make orders as to:

- the order evidence is to be given: **s 49(3)(a)**
- Order questions of fact are tried: **s 49(3)(b)**
- Time taken by a trial: **s 49(3)(c)**
  - Incl. time to cross-examine witnesses: **s 49(3)(d)(i)**
- Limit issues: **s 49(3)(e)**
- Limit duration of written or oral submissions: **s 49(3)(f)**

**These sections directly impact on the traditional adversarial system.**

## **Statement of issues: s 50 & 50A**

- Court may order the parties to consult and prepare a statement of issues that need determination by a court: **s 50**
- Does not displace pleadings: **s 50A(3)**
  - True pleadings decide the issues (see **s 50A(3)**) but pleadings can be overly complex and lengthy and have a tendency not to properly identify and confine the issues in dispute.

## **Sanctions: s 51**

- Sanctions that can be imposed on parties if they fail to observe directions orders made by court
- Court can even dismiss a proceeding or part of one: **s 52**

## **Court may revoke or vary direction or order: s 52**