

LAW5013

**PRINCIPLES OF LITIGATION AND
DISPUTE RESOLUTION**

EXAM NOTES

TRIMESTER ONE 2019

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TOPIC 1: DISPUTES AND THE CIVIL JUSTICE SYSTEM

1.2.2 CASE MANAGEMENT IN AUSTRALIA

Previously, a party could raise an issue or argument, even if late in the proceedings, if the prejudice to the parties was able to be compensated by cost orders (*QLD v JL Holdings*)

However, this view was rejected by the *High Court in AON v ANU*, with the Court holding that a party can be denied from bringing last-minute evidence or arguments if it will cause delay or increase costs

Factors to Consider for Granting Leave for an Amendment *per AON v ANU*

- Reason for delay
- Length of delay
- Prejudice to the other party and other litigants awaiting trial (risk the defendant's right to fair trial)
- Whether costs would compensate any prejudice
- What stage the application is made

1.3 THE CIVIL PROCEDURE ACT

The objective of the CPA is to change the culture of Victorian litigation by adopting a less adversarial approach

The overarching purpose of that Act is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute (*section 1 CPA*) – In doing so, Courts must have regard to the overarching purpose in exercising its powers (*section 1 CPA*)

Paramount Duty

Each person to whom the overarching obligations apply, has a paramount duty to further the administration of justice

1.3.1 OVERARCHING OBLIGATIONS

The CPA outlines overarching obligations that apply to the parties, legal practitioners, representatives or legal practices acting for parties, insurers and funders (non-exhaustive list) *per section 10(1) CPA*

The overarching obligations apply to any aspect of civil proceedings in court, including interlocutory applications and proceedings, an appeal from an order or judgment and ADR process (non-exhaustive list) *per section 11 CPA*

<i>Section 17</i>	To act honestly
<i>Section 18</i>	Requirement of proper basis
<i>Section 19</i>	To only take steps to resolve or determine the dispute
<i>Section 20</i>	To cooperate in the conduct of the civil proceeding
<i>Section 21</i>	Not to mislead or deceive
<i>Section 22</i>	To use reasonable endeavours to resolve the dispute by agreement
<i>Section 23</i>	To narrow the issues in dispute
<i>Section 24</i>	To ensure costs are reasonable and proportionate
<i>Section 25</i>	To minimise delay
<i>Section 26</i>	To disclose the existence of documents critical to the dispute

Sanctions for Contravening Overarching Obligations

- The Court may take into account a contravention of the overarching obligations in exercising its powers, including its discretion as to costs (*section 28 CPA*)
- The Court may also make any order if it is satisfied that the person has contravened the overarching obligations (*section 29 CPA*)
- The Court may make any orders it considers appropriate to further the overarching purpose (*section 65C(1) CPA*)

TOPIC 3: MULTIPLE PARTIES AND JOINDER OF CLAIMS

3.3.2 PERMISSIVE JOINDER

Two or more persons can be joined as plaintiffs or defendants in any proceeding where if separate proceedings were brought by or against each of them:

1. Some common question of law or fact would arise in all the proceedings: *Rule 9.02(a)(i); and -See A&J Partitions v Jolly*

2. All rights to relief claimed are in respect of, or arise out of the same transaction or a series of transactions: *Rule 9.02(a)(ii); or*

-This will be interpreted liberally (*Birtles v Commonwealth; cf Payne v Young*)

3. Where the Court gives leave to do so: *Rule 9.02(b)*

-The Court has broad discretionary power (*Bishop v Bridgelands*)

-The Joinder must not lead to unfairness – The Court will take whichever approach is more conducive to the just resolution of the dispute (*Bishop v Bridgelands*)

-Case management principles are relevant to this decision (*Lee v Korean Society of Victoria*)

Note: If one of the limbs in *Rule 9.02(a)* is established, the plaintiff is likely to succeed under *Rule 9.02(b)* (*A&J Partitions v Jolly*)

3.3.3 INCONVENIENT JOINDER

If the joinder is inconvenient, the Court may order separate trials, exclude claims, award costs or remove parties – This is a discretionary power of the Courts (*Thomas v Moore*)

Considerations under *Rule 9.04 SCR*:

-The joinder would embarrass the proceeding (unintelligible, ambiguous, vague or too general so as to embarrass the opposite party who does not know what is alleged against him *per Meckiff v Simpson*)

-The joinder would delay the trial (Efficient conduct of proceedings – *see section 9 CPA*)

-The joinder would cause prejudice to any party (*Bishop v Bridgelands*)

-The joinder would otherwise be inconvenient

Note: The Court will also consider res judicata and Anshun estoppel

3.3.4 MISJOINDER OR NON-JOINDER OF PARTY

A proceeding will not be defeated by a misjoinder or non-joinder – The Court may determine all questions in the proceeding so far as they affect the rights and interests of the parties (*Rule 9.05 SCR*)

3.3.5 ADDITION, REMOVAL AND SUBSTITUTION OF PARTIES (AFTER PROCEEDINGS COMMENCE)

Rule 9.06 SCR determines the Courts' power to add, remove or substitute parties in a proceeding

<i>Rule 9.06</i>	A Court may order that: (a) Persons who are not a proper or necessary party, cease to be a party
<i>Rule 9.06</i>	A Court may order that: (b) Any of the following be added as a party: (i) Person who should have been joined or whose presence is necessary to ensure all questions are effectually and completely determined and adjudicated upon; or (ii) Persons between whom and any party there may be a question arising out of, related to or connect with any claim in the proceeding, which it is just and convenient to determine
<i>Rule 9.06</i>	A Court may order that: (c) A person under paragraph (b) be substituted for one under paragraph (a)

TOPIC 4: COMMENCING PROCEEDINGS, SERVICE AND APPEARANCE

4.1.4 ALTERNATIVE COST STRUCTURES: LITIGATION FUNDING

Litigation funders are paid out of damages or settlements – They charge an interest rate of between 20-45%

This is slowly rising in Australia, particularly in the landscape of class actions

4.2 PRE-LITIGATION DISCLOSURE

There are no formal requirements such as letters of demand in Victoria since the repeal of *Chapter 3 CPA*

However, letters of demand are common practice prior to issuing proceedings – They often demand that the defendant pay a sum of money, cease doing something or notify an insurer of a claim

4.2.1 OVERARCHING OBLIGATIONS AND CERTIFICATION REQUIREMENTS

Although not bound by compulsory protocols, the failure to send a letter of demand may result in the finding of a breach of the solicitor's overarching obligations

The overarching obligations kick in when a claim is filed, but pre-filing behaviour will also be considered in an assessment of whether the overarching obligations were complied with (*Giles v Jeffrey*)

Relevant Overarching Obligations – CPA:

<i>Section 18</i>	A solicitor must not make a claim or make a response to a claim that is frivolous, vexatious, an abuse of the process or does not have proper basis
<i>Section 20</i>	A solicitor must cooperate with the parties and the court in connection with the proceeding
<i>Section 22</i>	A solicitor must make reasonable endeavours to resolve a dispute between the persons in dispute, including by ADR, 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
<i>Section 23</i>	If a solicitor cannot resolve the dispute by agreement, they must use reasonable endeavours to resolve any issues in dispute, and narrow the scope of the remaining disputes 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
<i>Section 24</i>	A solicitor must use reasonable endeavours to ensure that legal costs and other costs are reasonable and proportionate

Note: Certification Requirements

-Overarching obligation certification (*Form 4A*) – Certifying that a party has read and understood the overarching obligations and paramount duty (*section 41 CPA*)

-Proper basis certification (*Form 4B*) – Legal practitioner acting for parties certifies that each allegation of fact, denial, non-admissions has a proper basis (*section 42 CPA*)

-Mere failure to certify does not prevent commencement of proceedings (*section 45 CPA*)

4.2.2 OTHER CONSIDERATIONS

The Federal Court of Australia outlines compulsory protocols:

-Requires parties to take genuine steps to resolve/narrow issues in dispute (*section 4(1A) Civil Dispute Resolution Act*)

-The solicitor must file genuine steps certificate (*section 6(1) Civil Dispute Resolution Act*)

4.2.3 CONSEQUENCES

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 *per section 29 CPA*

TOPIC 5: DEFINING THE ISSUES IN DISPUTE

5.3 PLEADINGS PROCESS

Per Rule 13.02, the defendant must file and serve the defence in response to the statement of claim within 30 days of filing appearance or receiving the Statement of Claim (whichever is later)

If the defendant counterclaims, the plaintiff must file and serve the defence to counterclaim within 30 days

Note: Any reply in response to defence or defence to counterclaim must be filed and served by the plaintiff within 30 days

5.4 CONTENT OF PLEADINGS

Rule 13.02(1) SCR outlines the requirements of all pleadings:

- (a) Must contain in a summary form, a statement of all the material facts on which the party relies, but not the evidence by which those facts are to be proved
- (b) Where any claim, defence, or answer of the party arises under any Act, it must identify the specific provision relied upon
- (c) Must state specifically any relief of remedy claimed

Pleadings subsequent to the Statement of Claim must plead specifically any fact or matter which: *Rule 13.07(1) SCR*

- (a) Makes the opposite party's claim or defence not maintainable
- (b) Might take the opposite party by surprise
- (c) Raise questions of fact not arising out of the preceding pleading

A party may plead any fact or matter that has arisen before or after the commencement of the proceeding: *Rule 13.08 SCR*

Note:

- Material facts mean all the facts necessary to prove the cause of action
- Evidence is the information used to establish those facts
- Inconsistent allegations of fact are permissible in pleadings if they are made clear (*Rule 13.09 SCR*)
- The pleadings must not embarrass the parties or they may be struck out

5.4.1 FORMAL REQUIREMENTS

All pleadings must outline:

1. A description of the pleading and the date on which it is served
2. Must be divided into numbered paragraphs, with each allegation in a separate paragraph
3. Must be signed by the barrister/solicitor who drafted it

5.4.2 STATEMENT OF CLAIM

The State of Claim is the first pleading – It must disclose the cause of action in the following format:

1. Introductory statements (who the parties are, and how they are connected to the dispute)
2. The body (substantive allegations sufficient to establish each element of the cause of action)
3. Relief/remedy sought (also known as the prayer for relief)

TOPIC 6: METHODS OF GATHERING EVIDENCE

6.3.1 LEGAL PRIVILEGE

The main grounds of privilege is in *Part 3.1 of the Evidence Act*:

- Client legal privilege: *Sections 117-26 EA*
- Evidence of settlement negotiations: *Section 131 EA*
- Privilege against self-incrimination: *Section 128*
- Public interest immunity (matters of state): *Section 130*

6.4 INSPECTION OF DOCUMENTS

The inspection of documents can take place either in person or electronically – One party may serve a notice to produce, requiring the production of the documents in the affidavit *per Rule 29.09(1) SCR*

The other party has 7 days to appoint a time outlining when and where the documents may be inspected *per Rule 29.09(2) SCR*

At this point issues can arise such as the permitted use of documents (inappropriate use of disclosed documents; waiver of privilege; unintentional disclosure) or default in discovery (default; document destruction) (*Expense Reduction Group v Armstrong Strategic Management*)

6.5 PERMITTED USE OF DISCOVERABLE DOCUMENTS

There is an obligation not to use a discovery document for any purpose other than the litigation in which it is disclosed, unless and until, it is tendered into evidence and thus enters the public domain (*Hearne v Street*)

Commercially Sensitive Documents

If the document is commercially sensitive, confidentiality alone will not ordinarily be a sufficient reason to deny inspection by the opposite party – Consideration must be given to whether the action can proceed without confidential information being revealed beyond the relevant parties to maintain confidentiality

If the material is confidential but does not bear upon the case the plaintiff is seeking to make, it should not be revealed

6.6 RESTRICTED DISCOVERY AND PARTICULAR DISCOVERY

The Court may exclude wholly or limit the discovery of certain documents, or classes of documents to prevent unnecessary discovery (*Rule 29.05 SCR; section 55(2)(c) CPA*)

The court may also order a party to make an affidavit regarding certain documents or classes of documents if there are grounds to believe it is in that party's possession (*Rule 29.08 SCR; section 55(2)(a) CPA*)

6.7 ONGOING DISCOVERY OBLIGATIONS

A party who has made an affidavit of documents is under a continuing obligation to make discovery of documents with respect to documents of which the party obtains possession after making the affidavit (*Rule 29.15 SCR*)

TOPIC 7: INTERLOCUTORY PROCEDURES

7.2.1 ELEMENTS

1. There must be a serious question to be tried (prima facie case)
 - If the evidence remains as it is, there is a probability that the plaintiff will be held entitled to relief
2. Damages are an insufficient remedy
3. The balance of convenience favours the granting of an injunction
 - What loss will the plaintiff suffer if the conduct persists, versus if the conduct is prevented?
 - Consider the discretionary factors

7.2.2 DISCRETIONARY FACTORS

Discretionary factors include:

- The inconvenience and hardship that would be occasioned to the parties
- Any acquiescence or delay on the part of the applicant
- Whether the claim is frivolous or vexatious
- Desirability of preserving the status quo or preventing irreparable injury pending a full hearing

7.3 SEARCH ORDERS – ORDER 37B (ANTON PILLER ORDER)

Search orders were previously called Anton Piller orders – However they were introduced in 2006, renamed and codified as *Order 37B*

A search order can be granted in, or in anticipation of the proceeding, with or without notice to the respondent (*Rule 37B.02 SCR*)

These are primarily used for securing and preserving evidence, requiring the respondent to permit entry to the premises (*Rule 37B.02 SCR*)

7.3.1 HISTORICAL CONSIDERATIONS

The power of the search order was established in *Anton Piller v Manufacturing Processors* – In the judgment *Lord Denning* outlined the difference between a search order and a search warrant

The order essentially required the defendant to give permission for the applicant to enter, search and seize evidence from the premise, on pain of contempt

However, with time the order began to be granted more freely and became an oppressive tool of abuse (*Columbia Pictures Industries v Robinson; Universal Thermosensors v Hibben; Tony Blain Pty Ltd v Jamison*)

7.3.2 ELEMENTS

1. A strong prima facie case on an accrued cause of action
2. Potential of actual serious loss if the order is not made
3. Evidence that the respondent has important evidentiary material, and there is a real possibility of destruction or removal from reach in the proceeding
 - Usually requires evidence of misconduct
4. Full and frank disclosure highlighting arguments from both sides – These applications are made on an ex parte basis

TOPIC 8: REPRESENTATIVE PROCEEDINGS AND CLASS ACTIONS

8.1 INTRODUCTORY PRINCIPLES

Part 4A Supreme Court Act allows for 'group proceedings' otherwise known as 'class actions'

In this type of proceeding, one person brings proceedings representing a defined class, whose claim arises out of 'similar' circumstances – Members of the group on whose behalf the proceeding is commenced are 'group members'

The case can only be argued once, and all others in the class are considered to have had their case heard, and are then entitled to claim relief by virtue of being represented

Relevant Sources of Law:

-*Part 4A Supreme Court Act*

-*Practice Note SC GEN 10 – Conduct of Group Proceedings*

-*Part IVA Federal Court Act*

-*FCA Practice Note CM17 – Representative Proceedings Commenced Under Part IVA of the FCA*

8.2 THRESHOLD REQUIREMENTS

A proceeding may be commenced where: *Section 33C(1) SCA*

(a) 7 or more persons who have claims against the same person

(b) The claims of all those persons must be in respect of, or arise out of the same, similar or related circumstances

(c) The claims of all those persons gives rise to a substantial common issue of law or fact

Note: Representative proceedings may be commenced whether or not:

-Damages are sought (even if it requires individual assessment)

-Relief is the same for each person

-Separate transactions are involved

8.3 COMMENCING PROCEEDINGS

The application must be commenced by writ *per section 33H(1) SCA and must per section 33H(2):*

-Describe or otherwise identify the group members to whom the proceeding relates

-Specify the nature of the claims made on behalf of the group members and the relief claimed

-Specify the question of law or fact common to the group members

Note:

-It is not necessary to name members or specify the number of members in the group: *Section 33H(3) SCA*

8.4 OPTING OUT

<i>Section 33X</i>	Group members must be notified that the proceeding has been commenced, that they have the right to opt out, and the deadline for opting out
<i>Section 33J</i>	(1) The Court must fix a date before which a group member may opt out of a representative proceeding (2) Group members may opt out by written notice before the date fixed (3) The Court can extend the opt out period (4) Hearing of the matter must not commence before the opt out period has expired without leave
<i>Section 33Y</i>	(1) Form and content must be as approved by the Court

TOPIC 10: COSTS

10.1 INTRODUCTORY PRINCIPLES

A cost award is the amount of costs in a legal proceeding which the court orders on party to pay another – It is designed to reimburse for some (but not all) legal expenses incurred in conducting litigation

Costs generally refer to a client's legal costs: disbursements and reasonable costs of recording and transcript (*Rule 63.01*)

Note:

- Unrepresented parties cannot claim for the time they have spent preparing and running their case, unless they are a self-represented solicitor
- Does not include payments for time taken off work, emotional distress etc.

10.1.1 COSTS AND ACCESS TO JUSTICE

Cost awards play a role by:

- Providing access by indemnity for meritorious claims
- Deterring frivolous/vexatious claims or defences
- Discouraging parties from incurring unnecessary costs
- Encouraging settlement
- Giving the Court's discretion to address special circumstances

10.2 COST INDEMNITY RULE

In Australia, costs follow the event, with the losing party paying for the winning party's costs

The Court has full power and discretion to determine costs unless otherwise provided *per section 24(1) SCA* – The power and discretion of the Court as to costs under *section 24* must be exercised subject to, and in accordance with *Order 63*

Costs may also be used as a disciplinary tool (*sections 28-9 CPA*)

Costs can be measured in two ways:

1. Activity based scales (Eg. reading a letter associated with a litigious matter)
2. Event based scales (Eg. completing a stage in a litigious matter)

10.2.1 TYPES OF COST ORDERS

Costs in a proceeding which are to be taxed (calculated) shall be taxed on: *Rule 63.28*

- (a) A standard basis
- (b) An indemnity basis
- (c) Such other basis as the Court may direct

Standard Basis (*Rule 63.30*) – This is the Usual Basis *per Rule 63.31*

-On a taxation on a standard basis, all costs reasonably incurred and of reasonable amount shall be allowed

Indemnity Basis (*Rule 63.30.1*)

-On a taxation on an indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred