

LITIGATION EXAM NOTES 2025 (T3)

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INTRODUCTION

Sources of Procedural Law

Statutory

- Supreme Court (General Civil Procedure) Rules 2025 / County Court Civil Procedure Rules 2018 / Magistrates' Court General Civil Procedure Rules 2020 / VCAT Rules 2008 / Federal Court Rules/ FCFCOA Rules.

Inherent Jurisdiction

- Superior courts have inherent jurisdiction deriving from their superior court status. Courts regulate processes and prevent abuse therein (*Gunns*).

Judicial Role and Case Management

Objectives / Current Approach

- **CPA Overarching purpose:** Facilitate just / efficient / timely / cost-effective resolution of disputed issues (s 7(1) CPA).
- Courts have an obligation to take an active role in case management (reducing cost and delay factors) (*AON*; *Expense Reduction* (reversing *JL Holdings*)). The position in *JL Holdings* existed without the overriding objective existing.

Amending a Case

- Leave to amend depends on the rules, all the circumstances of the case, and factors including:
 - Reason for and length of delay in applying for the amendment (if the application was made in good faith).
 - Prejudice to the other party if amendment was allowed and whether costs could adequately compensate for it.
 - Stage of litigation in which the application was made.
 - Prejudice to other litigants awaiting trial dates/whose trial dates may be affected (public confidence), serving justice overall is paramount over individual litigants.
- Even an arguable case is insufficient to delay proceedings (even if compensable with costs) (*AON v ANU*).
- ANU sought adjournment 3-4 weeks before trial to amend SoC for new grounds against D#2 (AON) because D#1 had settled. **HELD:** HCA rejected the adjournment (*AON v ANU*).
- Lawyers sent solicitors acting for the Ds disc with docs that should have been marked 'privileged'. Interlocutory dispute about their return/waiver of 'privilege'. **HELD:** Courts to be proactive in avoiding 'unduly technical/costly disputes about non-essential issues'. Aust. Solicitors Conduct Rules (rule 30: preventing the taking advantage of error; rule 31: inadvertent disclosure). D should have returned the docs/not commenced an interlocutory dispute (*Expense Reduction*).
- International law case. Indicated the court was willing to permanently stay proceedings for an abuse of process (*UBS*).

Tools Under the CPA

- The CPA sought to enhance the court's case management powers (s 1(2)(c) CPA). To do so, the court can:
 - Impose reasonable limits, restrictions/conditions on the mgmt of the case/conduct of the parties (s 47(2)(a) CPA).
 - Actively manage the case through:
 - Directions (s 47(3)(a) CPA) / Clarifying issues in dispute (s 47(3)(c) CPA) / Encouraging party cooperation, settlement or ADR (s 47(3)(d) CPA) / Controlling proceedings through timetables, deciding multiple issues at once (s 47(3)(e) CPA) / saving time via limitations on Ws, and X-examination (s 47(3)(f) CPA).
- Can order and direct pre-trial procedures and hearing itself (ss 48, 49 CPA).
- Nothing in Part 4.2 CPA limits the inherent jurisdiction of the court to make any order it sees fit (s 53 CPA).

CIVIL PROCEDURE ACT (CPA)

Objective

- The CPA was a response to litigants' abuse of court processes (see *J L Holdings*). It only applies to litigation on foot.
- The underlying objective behind the CPA is to change the culture of litigation in Victoria by adopting a less adversarial approach, clarify by the purpose of the CJS and clarify the powers of the court (s 1 CPA).

Overarching Purpose

- Overarching purpose of the CPA is to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute' (s 7(1) CPA).
- The court must have regard to the overarching purpose in the exercise and interpretation of its powers (s 8(1) CPA).
- In making orders or giving directions in a civil proceeding, the court shall further the overarching purpose as well as:
 - The just determination of the civil proceeding (s 9(1)(a) CPA).
 - The public interest in the early settlement of disputes (s 9(1)(b) CPA).
 - The efficient conduct of the court's business and judicial and administrative resources (s 9(1)(c)-(d) CPA).
 - Minimising delay in commencement of civil proceeding and the trial beyond reasonably required interlocutory steps (s 9(1)(e) CPA).
 - The timely determination of civil proceedings (s 9(1)(f) CPA).
 - Ensuring the dealing is proportionate to the complexity of issues and the quantum in dispute (s 9(1)(g) CPA).

Who Does it Apply to?

- Civil proceeding participants (interlocutory matters/appeals/ADR) have a paramount duty to further the administration of justice (s 16 CPA).
- As [X] is a [insert from below], they will owe duties regarding the overarching obligations set out in the CPA apply.
 - A party (s 10(1)(a)) / Legal practitioner/legal rep (s 10(1)(b)) / Firm/practice for a party (s 10(1)(c)) / person who provides financial assistance to the parties (insurance, litigation funder) (s 10(1)(d)).
- The obligations do not apply to any witness (s 10(2) CPA), unless they are an expert witness, then in addition to any other duties owing they must comply with the overarching obligations (OO) [except ss 18, 19, 22, 26 CPA] (ss 10(3), (4) CPA).

Overarching Obligations

- To act honestly in the civil proceeding (s 17 CPA).
- Must not make a claim that: is frivolous (s 18(a) CPA) / is vexatious (s 18(b) CPA) / is an abuse of process (s 18(c) CPA) / does not have a proper basis, based on the factual/legal material available to the person at the time of making the claim / responding to the claim (s 18(d) CPA).
- Must not take steps unless they reasonably believe those steps are to resolve / determine the dispute (aim to avoid undue delay or expense) (s 19 CPA).
- Must cooperate with the parties in the conduct of the proceedings (s 20 CPA).
- Must not mislead or deceive (s 21(a) CPA) / engage in conduct likely to do so (s 21(b) CPA).
- Must use reasonable endeavours to resolve the dispute, unless it is not in the interest of justice (s 22(a) CPA) or the nature of the dispute makes judicial determination appropriate (s 22(b) CPA).

- Must use reasonable endeavours to resolve the issues in dispute (s 23(a) CPA) and narrow the scope of remaining issues (s 23(b) CPA), unless it is not appropriate in the interests of justice (s 23(c) CPA), or dispute is of a nature making only judicial determination appropriate (s 23(d) CPA).
- Must use reasonable endeavours to ensure that legal and other costs is reasonable and proportionate to the complexity or importance of issues in dispute (s 24(a) CPA) and the amount in dispute (s 24(b) CPA).
- Must use reasonable endeavours to act promptly and minimise delay (s 25 CPA).
- Must disclose to each party all documents that are or have been in the person's possession or control that the person is aware of (s 26(1)(a) CPA) **and** which the person considers / ought to reasonably consider, critical to resolution of dispute (s 26(1)(b) CPA).
 - Disclosure to occur at earliest reasonable time after person becomes aware of (s 26(2)(a) CPA) **or** any time the court directs excludes protected docs (s 26(2)(b) CPA).
 - Subsection 26(1) does not apply to any privilege document that has not been expressly or impliedly waived or under any protected by any Act (incl. Cth) or other law (s 26(3) CPA).
 - Disclosure is an ongoing obligation throughout proceedings (s 26(4) CPA).

CPA Certificated

- Two key certificates must be filed with the party's first substantive document (Statement of claim / defence for D).
- **Overarching obligations certification:** Each party must certify that the party has read and understood their overarching obligations and paramount duties under the CPA [ss 16-26 CPA] (s 41 CPA).
- **Proper basis certification:** Legal practitioner certifies that they hold a reasonable belief that each allegation has a proper basis (s 42 CPA).
 - Use Form 4B (s 42(2) CPA; r 4.10 SCR).
 - Unrepresented litigants must fill this out themselves (s 42(4) CPA).
- The court cannot prevent commencement of proceedings merely because of a failure to file either certificate (s 45 CPA) however failure will be taken into consideration when the court makes orders (s 46 CPA).

Contraventions and Sanctions

- In exercising any power in a civil proceeding (s 28(1) CPA) or costs (s 28(2) CPA), a court can take into account any contravention of an overarching obligation (s 28(1) CPA).
 - **Examples:** Indemnity costs may result / as an extreme, the court can end the proceeding.
- If satisfied on the BoP that a person has contravened an OO, a court can order a person [firms, lawyers or funders] to pay:
 - Some or all the legal (or other costs) arising from the contravention of the OO (s 29(1)(a) CPA) payable/enforceable immediately (s 29(1)(b) CPA).
 - Compensation for loss which was materially contributed to by the contravention of OO (s 28(1)(c) CPA) or remedy any contravention (s 29(1)(d) CPA).
 - An order excluding a person from specific steps in the civil proceeding (s 29(1)(e) CPA).or any order the court considers appropriate may be made if in the interests of justice (s 29(1)(f) CPA).

- Failure to comply with SCR does not render any proceeding nullified (r 2.01(1) SCR).
- Court can set aside case (wholly/partly), set aside steps taken by any party, or make amendments/orders (r 2.01(2) SCR).
- Courts may allow non-compliance with any rule (r 2.04(1) SCR).
- Always note inherent jurisdiction to dismiss proceedings or strike out defence (r 24.02 SCR)

- Five lawyers engaged in egregious conduct in connection with a fraudulent scheme. Lawyers contrived backdated costs agreements and invoices for hundreds of hours of work (*Bolitho v Banksia*).
- **Held:**
 - Parties have been ordered to \$25m total damages and costs.
- Dixon J emphasised this conduct constituted appalling breaches of their duties under the CPA. By attempting to claim more than \$19mil from a settlement sum the relevant individuals had “shattered confidence” in the lawyers.

Key Ethical and Professional Obligations

- Under the Australian Solicitors Conduct Rules 2015 (ACR), lawyers have the following key duties:
 - ASCR 3: Paramount duty to the court.
 - ASCR 4: Covers fundamental ethical duties.
 - ASCR 5: Covers dishonest/disreputable Conduct.
 - ASCR 7.1: Provide clear and timely advice to inform client of options.
 - ASCR 7.2: Advise of ADR.
 - ASCR 8.1: Follow lawful, proper and competent client instructions.
 - ASCR 9.1: Cannot disclose confidential info to anyone not a lawyer in the solicitor’s firm or a barrister briefed in the matter.
 - ASCR 21.1: Must ensure advice to invoke court powers is reasonably justified, appropriate for advancement of client’s case, not principally for harassment or embarrassment and is not principally to gain collateral advantages.
 - ASCR 21.3: Must not allege any matter of fact unless they believe on reasonable grounds that available material provides a proper basis for the fact.
 - Must ensure court processes not abused or used for an ulterior or improper purpose (*White Industries*).

APPROPRIATE DISPUTE RESOLUTION (ADR)

Introduction

- ADR is a means of private dispute resolution (without resorting to a court or tribunal (Productivity Commission)).

Models of ADR

Facilitative

- A 3P aids in the management of process of dispute resolution (spot issues, develop options, raise alternatives, reach agreement).
- 3P does not decide, rather, they facilitate the parties to resolve the dispute themselves.
 - **Mediation:** 3P identifies the issues in dispute, helps consider options and alternatives to aid the parties coming to the agreement. May be connected to court proceedings or in its own right as a DR process.
 - **Conciliation:** 3P has an advisory and not determinative role.
 - **Facilitated Negotiation:** 3P helps identify the problems to be solved, tasks completed and disputed issues.

Advisory

- 3P considers and appraises the dispute to provide advice on the facts of the dispute, the law and in some cases desirable outcomes.
 - Case appraisal.
 - Conciliation where advice is offered.

Determinative

- 3P determines the dispute, usually after hearing arguments and evidence, which is typically binding and enforceable.
 - **Arbitration:** Dispute is submitted to 3P for determination. Binding and only reviewable on limited grounds.
 - **Expert Determination:** Independent expert appointed to make a binding determination on some disputed facts or issues after hearing arguments and evidence from the parties.
 - **Private judging:** Arguments and evidence provided to an independent private judge who decides based on what, in their opinion, the likely decision would be if tried.

Advantages of ADR

- More flexible process.
- Control by the parties.
- Privacy.
- Cheaper, faster.
- Creative solutions (win-win outcomes).
- Enforcing outcomes.
- Communication/relationships.
- Inclusion of non-parties.

Limitations of Litigation

- Unpredictable outcomes – win/lose outcomes.
- Delays, expensive.
- Damage to relationships.
- Limited remedies available – rights vs. interests.
- Stressful for applicants.
- Focus on legal rights, not durable solutions.
- Publicity.

Court Annexed ADR

Compliance with Overarching Obligations

- In general, the OO's set in ss 16–26 CPA will apply to conduct in ADR as a 'civil proceeding' (s 11 CPA).
- There is a paramount duty for the court to further the administration of justice of ADR regarding civil proceedings (s 16(c) CPA).
- The OO's may be breached where [ADR is not attempted as]:
 - Ensure that the costs are reasonable and proportionate (ADR is generally cheaper) (s 24 CPA).
 - Participants must make reasonable endeavours to resolve the dispute including ADR (unless it is against the interests of justice or only judicial determination is appropriate) (s 22 CPA). Enforced through costs (s 29 CPA).
 - Participants are obliged narrow the issues in dispute (through a facilitative or advisory process) (s 23 CPA).
 - **Federal Courts:** Parties obliged to take 'genuine steps' to resolve or narrow the issues in dispute pre-litigation (may include ADR): Civil Dispute Resolution Act.
- The CPA is pro-ADR because it is concerned with the efficient resolution of disputes.

Court Powers to ADR

- A court can direct pre-litigation and litigation procedures and order ADR at any stage (ss 48, 49, 66 CPA).
- ADR is the process attended by parties to negotiating settlement/narrowing the issues in dispute (s 3 CPA).
- ADR can be made without the consent of the parties, unless it is an order for (s 66(2) CPA):
 - (a) arbitration / (c) expert determination / (d) other ADR that results in a binding outcome.
- If ADR for a judicial resolution is commenced, no evidence shall be admitted at the hearing of any proceeding of anything said or done in the course (unless approved by the court) (s 67 CPA).
- Judicial officer performing the judicial resolution has the same protection and immunity as a judge; cannot be required to give evidence in any proceeding about the conference (s 68 CPA).
- Consent of the parties must be provided if the ADR mechanism directly or indirectly results in a binding outcome as the parties are entitled to have their proceeding decided by a competent, independent and impartial court / tribunal (s 24(1) Charter of Human Rights and Responsibilities Act).

Obligations on Parties

- If the court refers the parties to annexed ADR, then the parties are not required to settle, but must negotiate in good faith (enforceable through costs under s 29 CPA).
 - Must engage in reasonable endeavours to resolve the dispute in ADR (s 22 CPA).
- Factors indicating an absence of good faith in ADR are:
 - Failure to communicate in a reasonable time (*WA v Strickland*).
 - No response to reasonable info request.
 - Unnecessary postponement.
 - Refusing to agree on trivial matters.
 - Adopting a rigid non-negotiable position.
 - Unilateral conduct harming negotiations.
 - Not taking steps to engage in discussions.
 - Stalling negotiations.

- Sending negotiators who have no authority to settle.
- Deliberate shift in position when agreement is in sight.
- Refusal to sign written agreement re process.
- Failure to make counter offers.

Enforcement

- Where parties agree to settlement terms, it has the binding effect of a contract if drawn up.
- Supreme Court of Victoria, Practice Note SC Gen 6 – Judicial Mediation Guidelines (Second Revision, 2023) – r 11.1 - If the matter resolves at mediation, and the parties consent, the mediator can make orders finalising the matter.

Lawyers and ADR

Professional Conduct Obligations

- Under the Australian Solicitor Conduct Rules, the legal professional must:
 - Provide clear and timely advice including alternatives to litigation ([ASCR r 7](#)).
 - Be ‘frank’ in court (includes ADR): requires correcting misconceptions or errors as they arise and communicate the rules to client ([ASCR r 19](#)).
 - **Example:** failure to correct insurer’s conception that client’s life expectancy was ‘normal’ when found the client had terminal cancer. Breach of professional obligations (*Legal Services Commissioner v Mullins*).

CPA Obligations

- The OO’s are owed by legal practitioners in the civil proceeding ([s 10 CPA](#)).
- The civil Obligations proceeding will include ADR ([s 1 CPA](#)).

LEGAL COSTS

Step 1: Introduction / General Rule

- Unless otherwise provided, the Court has the full power and discretion to determine costs, in both the proceeding and incidental matters (s 24(1) SCA).
- Courts generally follow the costs indemnity rule: loser pays the winners costs (s 24 SCA; *Re Jabe*).
- The power and discretion under s 24 SCA must be exercised subject to and in accordance with O 63 SCR (r 63.02 SCR).

Step 2: Taxation of Costs

- Subject to O 63 SCR, 'costs' in a proceeding can be taxed on either a standard basis (r 63.28(a) SCR); or an indemnity basis (r 63.28(b) SCR); or any other basis as directed by the Court (r 63.28(c) SCR).
- **Standard Costs (Default):** All costs reasonably incurred and of reasonable amount shall be allowed (r 63.30 SCR).
 - Standard costs are the default order (r 63.31 SCR).
- **Indemnity Costs (Punishment):** All costs except those unreasonably incurred / unreasonable amounts (r 60.30.1 SCR).
 - If there is doubt about 'unreasonableness' of a cost, resolve in favour of party liable to pay (r 63.30.1(2) SCR).
 - Typically requires some of abuse of process by the other side to get higher indemnity costs (*Gunns*).
 - If satisfied on the BoP someone breached overarching provisions, Court can make any costs order (s 29 CPA).
 - **[Go Through Breaches Topic: CPA]:**
 - Proper basis (filing a counterclaim based on unfounded info) (s 18 CPA) / Obligation to only take steps to resolve dispute (seek interrogatories from unrelated parties) (s 19 CPA) / Obligation to reasonably endeavour to resolve dispute (s 22 CPA) / Minimise delays (s 25 CPA).

Step 3: Standard Costs

- **WRITE:** The default position is the unsuccessful party will pay the costs in the litigation (cost indemnity rule).
[Consider exceptions below].

Exception 1: Party Ultimately Wins but Loses on Some Issues

- Where [P] ultimately wins but loses on some issues, the court may fix the proportion of total costs between the parties based on a percentage approach of time spent on each issue (r 63.04 SCR).
 - **Example:** Won the contract claim, lost the MDC claim.
- **Counterclaims:** Apportion based on the size of the victory, not the net gain (considering the complexity of the action).
 - Apportion costs between the parties based on a percentage approach of time spent on the issue (*Byrns v Davie*).

Exception 2: Public Interest Litigation

- **Public interest group successful:** Court may award costs on an indemnity basis because one person or group is incurring a substantial amount of costs on behalf of the wider community (*Aus Federation*).
- **Public interest group unsuccessful:** Could avoid a costs order against them entirely, however not guaranteed as position of the group as in public interest does not override ultimate position of costs indemnity rule (*Bat Advocacy*).

Exception 3: Party Rejects a Settlement Offer (which they fail to better at trial)

- Most cases are settled without trial; civil procedure encourages parties to settle proceedings prior to a trial:

- OO: 'take steps to resolve the dispute' (s 19 CPA) / 'use reasonable endeavours to resolve' (s 22 CPA) / OO: 'narrow the issues in dispute' (s 22 CPA).
- A negotiation made 'without prejudice' is privileged and therefore inadmissible as E including on the pronouncement of costs (s 131 Evidence Act).
- **[Consider types of settlement offers below].**

Option 1: Pre-Litigation Offer

- **WRITE:** If there is a pre-litigation offer in the form set in r 26.08.1(1) SCR, then the court **MUST** take that into account in determining a costs order (r 26.08.1(1) SCR).
- The court may order the offeree pay [all / part] of the offeror's costs on any basis from the day of the offer, commencement of proceeding / any other time (r 26.08.1(2) SCR).

Requirements

- A pre-litigation offer is one that is (r 26.08.1(1) SCR):
 - In writing (whether or not expressed without prejudice).
 - Made to compromise any claim made in the proceeding (on terms specified). **AND**
 - Open for acceptance for a reasonable time, although has not been accepted. **AND**
 - The offeror obtains an order for judgement no less favourable than the terms of the offer.

Option 2: Calderbank Offers (Without Prejudice, Save as to Costs)

- **WRITE:** If genuine Calderbank offer was unreasonably rejected by OP and OP failed to 'better the offer' in judgement, the court may take this into account when considering costs (*Calderbank*; *Hazeldene*).
 - **Example:** Party A makes an offer to Party B to settle the case for \$100,000. Party B rejects the offer and goes to trial. The court's decision is less favourable to Party B than the offer (B only gets \$80,000).
 - The court may order Party B pays Party A's costs from the date the offer was made (even if B "won" in part).
- An offer made 'without prejudice save as to costs' may be admissible evidence for costs (*Calderbank*; *Hazeldene*).
- **Timing:** Can only be made when proceedings on foot.
- **Form:** Must state "without prejudice save as to costs" and cite '*Calderbank*'.
 - The offer must make it clear that the offer will be produced on the issue of costs; and
 - Must purport to rely on the principles in *Calderbank* (seek indemnity costs if the reasonable offer is not bettered at trial).

Consequences

- If the offeree has unreasonably rejected a bona fide Calderbank offer, the court may order indemnity costs measured from the time of the offer (*Calderbank*; *Hazeldene*).

Unreasonably Rejected Factors

- Unreasonable Calderbank offer rejection factors (non-exhaustive) (*Hazeldene*):
 - The stage of the proceeding in which the offer was received.
 - If it was very early it's hard to know whether it is 'unreasonable'.
 - Offers made before discovery where no E of D's defence/strength: not unreasonable (*Pepe*).
 - The time allowed to the offeree to consider. Must be longer than overnight (*DP v Bird*).
 - Extent of the compromise offered.
 - The offeree's prospect of success, assessed at the date of the offer.

- The clarity of the terms of the offer.
- Whether the offer foreshadowed an application for indemnity costs in the event of the offeree rejecting it.

Example Text

- ‘We put you on notice [if rejected] then we will produce this letter on the question of costs [so the P pays on an indemnity basis from the date of the letter] in accordance with the principles set out in *Calderbank*’. The offer was more favourable than the judgment award, so this letter was adduced on the matter of costs (*Hazeldene*).

Option 3: Offers of Compromise (OOC) (Order 26 (More Formal/Restrictive than a Calderbank Offer))

- Regarding any claim, a party may serve an offer of compromise (OOC) (r 26.02(1) SCR).
 - Can be on terms that consider other claims in the proceedings (r 26.02(2) SCR).
 - An OOC under O 26 is taken to be made without prejudice unless the offer otherwise provides (r 26.04 SCR).

Procedural Requirements

- **Form:** The offer must:
 - Be in writing prepared in accordance with rr 27.02-04 SCR and state it is served per O 26 (r 26.02(3) SCR).
 - Identify whether inclusive of costs or costs are payable in addition to the offer (r 26.02(4) SCR).
 - 27.02 SCR: Doc heading: ‘**In the Supreme Court of Victoria**’, state ‘**in the matter of**’ (if by originating motion), **case number**, **names of the parties** (if more than two P’s, include the full names of the first P followed by ‘and others’ (same for D’s), and provide other names in a schedule.
 - 27.03 SCR: Doc in PDF, text searchable, consecutive page numbers, printable at A4, 25mm LH margin, 30mm top margin kept clear, double spacing, legible text, title and short description of document, date, party filing, and lawyer’s details.
 - 27.04 SCR: Numbers in figures, not words.
- **Time:** OOC may be served any time before judgment (r 26.03(1) SCR). Multiple offers can be served (r 26.03(2) SCR).
 - OOC can express acceptance to be limited to a time not less than 14 days after service (r 26.03(3) SCR).
 - While the acceptance period is open, the offer cannot be withdrawn, unless the court orders (r 26.03(5) SCR).
- **Acceptance:** Can accept within acceptance period. If no time specified, before 14 days after service (r 26.03(4) SCR).
 - Can accept an offer even if an additional OOC is made by the party served (r 26.03(6) SCR).
 - If either party defaults on the acceptance terms, the non-defaulting party can apply for an order (r 26.07.1 SCR):
 - (a) giving effect to the accepted offer / (b) staying or dismissing the proceeding / (c) striking out the defence / (d) the claim shall proceed without the offer.
 - **Exception:** Rule does not apply if there are multiple Ds with joint / several liability; and rights of indemnity or contribution exist between the two (r 26.07.2 SCR) (unless offer is made to all Ds) (r 26.07.2(2) SCR).
- **Time for Payment:** An OOC providing for defined sum (\$X) shall (unless it provides otherwise) be taken to be providing for payment within 28 days of acceptance (r 26.03.1 SCR) (need financial capacity to meet the offer).
 - The accepting party can withdraw the acceptance if the defined sum is not paid within the specified period (28 days if no period specified) and if the court gives leave to do so (r 26.07 SCR).

Other Matters

- **Disclosing offers:** No statement regarding an OOC being made can be contained in pleadings/affidavits (r 26.05 SCR).
 - If the OOC is not accepted, then unless r 26.08(6) applies, no communication about it can be made to the court until questions of liability / relief are determined (r 26.05(2) SCR).
 - **Exception:** Unless the offer is not made without prejudice (r 26.05(3) SCR).

- **Capacity:** Persons under disability can make / accept an OOC but court must approve to make binding (r 26.06 SCR).

Effect of OOC

- D rejects P's offer and P gets a result no less favourable than their offer (P gets equal or better than offer).
 - **Injury claim:** D pays P's costs on indemnity basis (r 26.08(2)(a) SCR).
 - **Non-injury:** D pays P's costs on a standard basis to 11am on 2nd business day after offer served, thereafter D pays P's costs on indemnity basis (r 26.08(2)(a) SCR).
- P rejects D's offer and P gets a result no more favourable to them than D's offer (P gets less than offer).
 - D pays P's costs on a standard basis up to 11am on 2nd business day after offer served (26.08(3)(a) SCR) and P pays D's costs on standard basis thereafter (r 26.08(3)(b) SCR).
- P unreasonably rejects D's offer: P's claim is dismissed/judgement is for D:
 - P pays D's costs on a standard basis up to 11am on 2nd business day after offer served, thereafter P pays D's costs on an indemnity basis (r 26.08(4) SCR). Refer to *Hazeldene* factors.

Exception 4: Breaches of the CPA

- If a party breaches the overarching purpose and obligations under the CPA, the court may consider such a breach when making a cost order (s 28(2) CPA) or may make a particular cost order in response to the breach (s 29 CPA).
 - Court has ultimate discretion to make any order re costs to further the overarching obligations (s 65C(1) CPA).
- **WRITE:** [X] may allege that [participant] has breached their strict duty to comply with the OO, which exists in addition to any obligations under the SCA or SCR. The court is under an obligation to hold the participants to account for their OO compliance (*Yara*; s 29 CPA).

Applicability

- **WRITE:** A participant in any civil proceeding (interlocutory matters, appeals and ADR (s 11 CPA)) has a paramount duty to further the administration of justice in relation to the proceeding (s 16 CPA).
- As [X] is a [insert from below], they will owe duties regarding the overarching obligations set out in the CPA apply.
 - A party (s 10(1)(a)) / Legal practitioner/legal rep (s 10(1)(b)) / Firm/practice for a party (s 10(1)(c)) / person who provides financial assistance to the parties (insurance, litigation funder) (s 10(1)(d)).
- Obligations apply to expert W (s 10(2) CPA). They must comply with the overarching obligations (OO) [except ss 18, 19, 22, 26 CPA] (ss 10(3), (4) CPA).

Overarching Obligations [Topic Link: See CPA Overarching Obligations]

- **WRITE:** [X] is under an OO to use reasonable endeavours ensure the costs (legal / other) in the dispute are reasonable and proportionate to (a) the complexity or importance of issues in dispute and (b) the amount in dispute (s 24 CPA).
 - Application for leave was overrepresented and oversupplied appeal books. **HELD:** Leave refused; CoA invited submissions as to whether s 24 CPA was breached. Was there was (a) an overrepresentation of the parties by counsel; and (b) production of unnecessary and excessive materials creating strain on administrative system. This was an interlocutory matter, so the steps taken seemed disproportionate (*Yara*).

Other Potential Breaches

- **CPA Certification:** Failure to comply with the certification requirements also has cost implications (s 46 CPA).
 - **OO certification:** Each party must certify that the party has read and understood their OO and paramount duties under the CPA [ss 16-26 CPA] (s 41 CPA).
 - **Proper basis certification:** Lawyer certifies they hold a reasonable belief each allegation has a proper basis (s 42 CPA).
- **Failure to provide discovery:** OP will also be required to pay for P's notice expenses (r 63.16.1 SCR).

Consider Technology

- Court expects parties to acquit obligation to ensure costs are reasonable and proportionate by employing technology to save time and costs – consistent with CPA (cl 4.1 PN SC Gen 5).
- Hard copy documents to be exception rather than rule (cl 4.3 PN SC Gen 5).

Contraventions and Sanctions

- If OO is contravened, court can consider the contravention in the exercise of its powers/discretions as to costs (s 28 CPA). **Examples:** Indemnity costs may result / as an extreme, the court can end the proceeding.

Application

- Order under s 29 CPA can be made on application of the parties/person who has a sufficient interest, or the courts' own motion (s 30 CPA).
- If satisfied on the BoP that a person has contravened an OO, a court can order a person [firms, lawyers, funders] to pay:
 - Some/all the legal (or other costs) caused by contravening the OO (s 29(1)(a) CPA) payable/enforceable immediately (s 29(1)(b) CPA).
 - Compensation for loss which was materially contributed to by the contravention of OO (s 28(1)(c) CPA) or remedy any contravention (s 29(1)(d) CPA).
 - An order excluding a person from specific steps in the civil proceeding (s 29(1)(e) CPA) or any order the court considers appropriate may be made if in the interests of justice (s 29(1)(f) CPA).
- The orders have both compensatory and punitive elements (*Yara*).
- In addition, the court can make any order it sees fit to further the overarching purpose re costs (s 65C(1) CPA).

Step 5: Interlocutory Disputes

- In interlocutory applications, a party pays their own costs for the proceeding if (a) no order is made re costs **OR** (b) court order is silent re costs (unless ordered otherwise) (r 63.20 SCR).
- Court can reserve judgment on costs in interlocutory applications (loser postponed to pay at the end) (r 63.22 SCR).
 - **Costs in any event:** loser pays costs of particular hearing.
 - **Costs reserved:** costs for IPs deferred until proceeding is finalised.
 - **No order as to costs:** each party bears own costs of interlocutory hearing.
 - **Costs in the cause:** costs to be borne by the party that ultimately loses the action.
 - **Costs thrown away:** costs wasted because steps already taken became pointless (drafting defence to SOC that is subsequently amended). Costs to be borne by party that rendered them pointless.
 - **If order is silent as to costs:** successful parties entitled to costs in the cause.

Step 6: Orders Against Lawyers

- Costs may be made against lawyers if they breach a CPA overarching obligation (s 29 CPA).
 - Keep costs 'just and proportionate' apply to lawyers / firms / practitioners (ss 11, 24 CPA).
 - The court can make an order directing the lawyer to provide estimates of trial length, costs & disbursements, and costs they would need to pay if unsuccessful. This can be in memo form (s 65A CPA).
- Costs may be ordered against a barrister or solicitor where lawyer has incurred costs improperly or without reasonable cause **OR** costs are wasted by lawyer's failure to act with reasonable competence or expedition (r 63.23(1), (7) SCR).
- Reasonable competence or expedition will occur where an application or trial cannot be conveniently heard or proceed or fails or is adjourned without useful progress where b/c of the solicitor's failure to (r 63.23(2) SCR):

- (a) Attend in person or by proper representative / (b) File any doc that should have been filed / (c) Lodge or deliver any doc for use or court / (d) Be prepared with proper evidence/account / (e) Otherwise proceed
- The court can order (a) the client is not liable to pay all / part of the lawyer's fees **OR** (b) the lawyer pay the other side's costs **OR** (c) the lawyer must reimburse the client for costs (r 63.23(1) SCR).
- The court cannot make an order without giving the lawyer a reasonable opportunity to be heard (r 63.23(3) SCR).

Indemnity Orders Against the Solicitor

- The court could also make an order against the solicitor to pay all or any of the costs to the relevant party (r 63.23 SCR).
- Solicitor knew the claim was incapable of succeeding but issued it anyway to give their client a better bargaining stance. Solicitor forced to pay indemnity costs (*White Industries*).

Step 7: Court Orders Against Parties

Protective Cost Orders

- Protective costs orders cap the recoverable costs in advance and the court will grant an order where appropriate to further the overarching purpose (s 65C(2)(d) CPA). Any party can apply for this. Factors to consider (s 65C(2A) CPA):
 - (a) Timing of application / (b) Complexity of issues / (c) Financial compensation sought? / (d) Not a frivolous claim / (e) Undesirability of forcing A to abandon proceedings if cannot get order / (f) Any public interest? / (g) Likely costs to parties / (h) Cooperation of opponent? (i) Ability of A to pay costs / (j) Significant number of public affected? / (k) Significant issues raised?

Security for Costs (OP Application Only)

- OP may apply for order that P gives security for OP's costs where there is a risk that OP might have no reasonable prospect of recovering their costs if ultimately successful (r 62.02(1) SCR).
 - Court has ultimate discretion as to what the security is (r 62.03 SCR).
 - Where P fails to give security, court can dismiss P's claim (r 62.04 SCR).
- Circumstances where security can be ordered (r 62.02(1) SCR):
 - (a) P ordinarily resident outside Vic.
 - (b) P is corporation/suing for another's benefit and reason to believe P has insufficient Vic assets.
 - (c) P has proceeding in another court for same claim.
 - (d) Address of P not stated/incorrectly stated in writ (innocent mistake this isn't a reason (r 62.02(2) SCR)).
 - (e) P has changed address after commencement to avoid consequences of proceeding.

Step 8: Disputing Quantum of Costs

- If there is no specific order as to amount of costs and parties disagree, parties could go to Costs Court. This is initiated by summons in Form 63A which must be served within 14 days before day for hearing on the other party (r 63.38 SCR).
 - The parties appear before an Associate Judge in the Costs Court.
- The quantum can be assessed by the Court's Scale of Costs (this is less than what the client is billed). Can be activity based ('attendance by lawyer') / Event based ('hearing').
- Parties can negotiate or settle as to the quantum.