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LDR EXAM TEMPLATE

Pre-litigation Steps:

Letters of Demand

It is common practice to send a Letter of Demand to alert the OP that an issue has arisen and they need to take steps to resolve it or compensate P, otherwise P will commence litigation. It is not a requirement but if done properly Letters of Demand are looked upon favourably in procedural determinations.

What to include:

- Consequences suffered because of D's actions
- Compensation P seeks
- Invite D to negotiate or mediate the issue to avoid litigation
- LOD and at the end inviting to mediate shows good faith and an attempt to resolve the dispute.

Does the CPA apply to LODs?

Letters of demand written before a lawsuit starts are not covered by Part 2.3 of the Civil Procedure Act's overarching obligations [Giles v Jeffrey, s3 CPA]. However once a proceeding is issued, the CPA comes into play (Giles v Jeffrey).

If proceedings NOT issued STATE- proceedings are not in play yet, but if proceedings commence, even for ADR (s.11 CPA), and the LOD is relied upon then then the OO retrospectively it will apply. [best answers pick this up]. For any form of proceeding, the OO will apply.

Pre-Litigation Offers

X may make an [Calderbank offer/offer of compromise] in writing re a claim prior to commencing proceedings (**r 26.08.01(1)**). If this was not accepted, the court will consider this in any costs order (see legal costs).

Pre-Action Protocols

Before issuing proceedings, must consider:

- **Solicitors' Conduct Rules** (Rules 3-7, 19, 21, 22)
- **Cost Disclosure** (LPUL Pt 4.3, div 3)
- Overarching obligations in Part 2.3 (ss 16-27 CPA)
- Sanctions for contravention in Part 2.4 (ss 28-31 CPA)
- Certification requirements in Part 4.1 (ss 41-42, 44-46 CPA)

Australian Solicitors' Conduct Rules

Rule 3. Paramount duty to the Court and to the administration of justice

3.1: A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

- So prevails over duty to client – for example, where they want you to plead a cause of action that you don't think can be established

Rule 19. Frankness in Court

19.1: A solicitor must not deceive or knowingly or recklessly mislead the court.

e.g. pleading a cause of action based on law you know to have changed

Rule 21 – Responsible use of court process and privilege

21.1: Solicitor must take care to ensure that their advice to invoke coercive powers of a court

- 21.1.1 is reasonably justified by the available material
- 21.1.2 is appropriate for the robust advancement of client's case on merits
- 21.1.3 is not made principally in order to harass or embarrass a person
- 21.1.4 is not made in order to gain some collateral advantage

21.3: Solicitor must not allege any matter of fact in court docs, submissions, opening or closing address unless the solicitor believes on reasonable grounds that the available factual material provides a proper basis to do so.

See *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169

White Industries (Old) Pty Ltd v Flower & Hart (a firm) (1998) 156 ALR 16920, Goldberg J held that solicitors at Flower & Hart breached their duty to the court and the administration of justice when they “instituted a proceeding on behalf of its client alleging fraud when there was **no factual basis** for that allegation and in respect of a cause of action which it believed could not be won”. They had done so to **buy time for their client and gain a ‘temporary bargaining stance.’**”

- Goldberg J ordered Flower & Hart to pay the indemnity costs of the related proceeding – some \$1.65 million (in 1998 money!).

Cost Disclosure

Legal Profession Uniform Law pt 4.3, div 3

Rule: [X] is required to make written costs disclosures when or as soon as practicable after being instructed by [Y] (s 174 LPUL).

Additionally, X has to take all reasonable steps to ensure Y understands the agreement and consents to it (s 174(3)) LPUL.

Exceptions:

Note cost agreements not required for matters below \$750 (s 174(3) LPUL).

If the total costs are unlikely to exceed the ‘higher threshold’ (regs: \$3,000) → can use the standard disclosure form (s 174(5) LPUL).

What if lawyer doesn't comply?

- If you don't provide an estimate for how much the cost will be, you have no entitlement to recover costs even if you win until the matter has been resolved by the cost courts.
- You could be referred to the legal services board and have disciplinary action taken against you.

Consequences of non-compliance by the lawyer:

Since X did not comply with the requirements set out in Part 4.3 of the LPUL, X will not have entitlement to recover costs even if X wins until the matter has been resolved by the cost courts. X could be referred to the legal services board and have disciplinary action taken against them.

CPA Overarching Obligations

Introduction: Participants have OO in the conduct of litigation (ss 17 – 26). Parties are also subject to the **paramount duty** to further the administration of justice (s 16). These prevail over any other legal/contractual obligations (s 12).

S 16 CPA: Paramount duty

Each person to whom the overarching obligations apply 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 interlocutory 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.

S 18 CPA: Overarching obligation – requirement of proper basis

A person to whom the overarching obligations apply 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.

Step 1: Is X bound by the OOs?

X is bound by the OOs because they are (s 10(1)):

- (a) A party to the proceedings
- (b) A legal practitioner or other representative acting on behalf of a party
- (c) A law practice acting on behalf of a party
- (d) A litigation funder, insurer or any other person who has influence over the proceeding while providing financial assistance to X

Step 2: Do the OOs apply?

OOs apply to dispute because this concerns an aspect of a civil proceeding in a court (s 11 CPA)

- (a) **Interlocutory** proceedings
- (b) **Appeals** from an order or judgement
- (c) Any **ADR** undertaken in relation to a civil proceeding

LOD pre commencement – OO does not apply

Step 3: Which OOs are breached?

Relevant overarching obligations include

- s 17 - to **act honestly**
- s 18 - **requirement of proper basis**
- s 19 - to only take steps to **resolve or determine dispute**
- s 20 - to **cooperate in the conduct of civil proceeding**
- s 21 - not to **mislead or deceive**
- s 22 - to use **reasonable endeavors to resolve dispute**
- s 23 - to **narrow the issues in dispute**
- s 25 - to **minimize delay**

Acting honestly (s 17)

- X will be in breach of the OO to act honestly (s 17) given [conduct] demonstrates that X has not acted honestly at all times in relation to the [civil proceeding]. X has subjectively intended to [insert ACT] which can be said to be objectively dishonest by the ordinary standards of the reasonable and honest person (*Bolitho*).
- Analogise with *Bolitho*
 - o Contrived backdated costs agreements and invoices which included hundreds of hours for work that had never been performed
 - o Authored a misleading opinion of counsel and procured a report from an expert costs lawyer
 - o Issued financial threats against group members (clients)
 - o SC abused his standing and influence to deceive the court and other lawyers into trusting his representation concerning his fees.

Proper basis (s 18)

- X will be in breach of the OO to not make any [claim/response to a claim] that is [frivolous (s 18(a)/ vexatious s 18(b)/ abuse of process s 18(c)]/ does not, on the factual and legal material available to them at the time of making or responding to the claim, have a proper basis s 18(d)]/
- [Facts] suggests that X did not ‘access whether a proper basis existed when advancing/responding to a claim’ (*Bolitho*).

Necessary steps to resolve the dispute (s 19)

- X will have breached the OO to only take steps they reasonably believe are necessary to resolve the dispute (s 19), because [conduct] is not reasonably necessary to facilitate the resolution or determination of the proceeding.

Cooperate (s 20)

- X has likely breached the OO to cooperate (s 20) because they have not cooperated with the [parties/court] in connection with the conduct of the proceeding/

Not mislead or deceive (s 21)

- [X’s conduct] was capable of inducing Y into error (*Bolitho*), and therefore X has likely engaged in conduct that is misleading or deceptive (s 21(a)), or at least likely to mislead or deceive (s 21(b)).

Reasonable endeavours to resolve the dispute (s 22)

- Since [X did not engage in ADR], they are likely in breach of their OO to use reasonable endeavours to resolve the dispute by agreement, including, if appropriate, by ADR (S 22). However, [conduct] may not constitute a breach as
 - (a) It is not in the interests of justice for [parties with a power imbalance to agree] OR
 - (b) The dispute is of a nature that only judicial determination is appropriate [since a civil penalty is being sought].

Narrow the issues in dispute (s 23)

- By [X’s conduct – disclosing unnecessary document], they may be in breach of their OO to narrow the issues in dispute (s 23).

Ensure costs are reasonable and proportionate (s 24)

- X may have breached their OO to ensure costs are reasonable and proportionate to the complexity of the dispute (s 24(a)), being [a relatively straightforward matter] and the amount in dispute [a relatively small amount] (s 24(b)). This necessitates a ‘fact-sensitive inquiry’ (*Bolitho*), which in this case, indicates that costs [were/were not] reasonable.

Minimise delay (s 25)