

1.0 Introduction to Civil Justice System

2.0 Pre-Litigation Steps and Appropriate Dispute Resolution (ADR)

3.0 Costs in Litigation

4.0 Jurisdiction, Parties and Claims

5.0 Commencing Proceedings, Service and Appearance

6.0 Defining the Issues in Dispute and Summary Disposition

7.0 Urgent Applications

8.0 Gathering Evidence (Discovery)

9.0 Class Actions

10.0 Disposition and Withdrawal

1.0 Introduction to Civil Justice System

1.1 Procedural Law and Case Management

Overarching Purpose of the Court

EXAM STRUCTURE: When making a decision (**s 9(1)**) the court must have regard to its overarching purpose (**s 7(1)**). To facilitate the just, efficient, timely and cost-effective resolution of real issues in dispute. Court must seek to give effect to this overarching purpose in the exercise of any of its powers

- The Court must have regard to the factors in **s 9(1)**
- The Court **may** also consider factors under **s 9(2)**

Mandatory Considerations – **s 9(1)**

- In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects:
 - (a) Just determination of the proceeding
 - (b) Public interest in early settlement
 - (c) Efficient conduct of the court;
 - (d) Efficient use of judicial and administrative resources;
 - (e) Minimising any delay between commencement and listing for trial
 - (f) Timely determination
 - (g) Dealing with the dispute in a manner proportionate to the complexity/importance of issues, and the amount in dispute

Discretionary Considerations – **s 9(2)**

- For the purposes of **s 9(1)**, the Court may have regard to:
 - i. Compliance with pre-litigation processes;
 - ii. Endeavours to resolve the dispute
 - iii. Promptness of the parties in conducting the proceeding
 - iv. Lack of promptness as a result of matters beyond control;
 - v. Compliance with overarching obligations
 - vi. Potential prejudice to a party
 - vii. Public importance of the issue and desirability of judicial determination
 - viii. The extent to which the parties have had the benefit of legal advice and representation

Overarching Obligations under the Civil Procedure Act 2010 (Vic)

EXAM TIP: almost every exam question will involve asking whether there has been a breach of the OOs

STEP 1: DO THE OOs APPLY?

- The OOs apply to ‘participants in civil proceedings, as defined under **s 10**:
 - (1)(a) Parties;
 - (1)(b) Lawyers / party representatives’
 - (1)(c) Law practices;
 - (1)(d) Any person who provides financial (or other) assistance to any party, insofar as they exercise any direct or indirect control or any influence over the proceedings or of a party including, but NOT limited to:
 - (i) Insurers; and
 - (ii) Litigation funders
- (3) Expert witnesses, except OOs in **ss 18, 19, 22, 26**

STEP 2: WHERE DO THE OOs APPLY?

- OOs apply in respect of the conduct of **ANY aspect of a civil proceeding** including, but not limited to (CPA s 11):
 - (a) Interlocutory applications/proceedings;
 - (b) Appeals
 - (c) Appropriate dispute resolution undertaken in relation to a civil proceeding

STEP 3: WHAT ARE THE OOs?

- **Paramount Duty:** each person to whom the OO apply has a paramount duty to the Court to further the administration of justice in relation to any civil proceeding in which they're involved (**CPA s 16**)

CPA Section	Overarching Obligation
S 17	Act honestly
S 18	Proper basis; not make frivolous, vexatious, abuse of process claims
S 19	Only take steps that are necessary in dispute
S 20	Cooperate in the conduct of the proceeding
S 21	Not mislead or deceive
S 22	Use reasonable endeavours to resolve dispute
S 23	Narrow the issues in dispute
S 24	Ensure costs are reasonable and proportionate
S 25	Act promptly and minimise delays
S 26	Disclose existence of documents (for discovery)
S 27	Only use discovered documents for the proceedings

STEP 4: FAILURE TO COMPLY W/ OOs?

Court may take into account:

- In exercising any power re the civil proceeding, the court may take into account any contravention of the OO (**CPA s 28(1)**), including in exercising its discretion as to costs (**CPA s 28(2)**)

Court may make certain orders:

- If court is satisfied that, on BOP, a person has contravened the OO, the court may make any order it considers appropriate in the interests of justice, **INCLUDING**, but not limited to (**CPA s 29(2)**)
 - Order that the person pay some or all of the **legal costs, other costs**, or expenses of any person arising from the breach;
 - Order that the legal costs, other costs, or expenses of any person be payable and enforceable immediately;
 - Order that the person compensate any person for any financial loss or other loss which was materially contributed to by the breach, including
 - (i) an order for penalty interest in respect of any delay in the payment of an amount claimed; **or**
 - (ii) an order for no or reduced interest
 - Order that the person take any specified steps which are reasonably necessary to remedy the breach;
 - Order that the person NOT be permitted to take specified steps in the proceeding;
 - Any other order the court considers to be in the interests of any person who has been prejudicially affected by the breach

Case Management

- Alongside the common law, 'case management' is reflected in, or facilitated by, other sources of law (e.g., legislation)
 - On a narrow view, case management is '**primarily a response to concerns about the cost of litigation and the length of time it was taking for cases to proceed through the civil justice system**'

Non-Compliance with Case Management Legislation

- Under **SCR**:
 - Failure to comply does not render any action nullified (**r 2.01**)
 - Court can set aside the case (wholly or partly), set aside any step taken by any party or make any amendments or orders (**r 2.01(2)**)
 - Courts may allow non-compliance with any rule (**r 2.04(1)**)
 - Always note inherent jurisdiction to dismiss proceedings or strike out defence (**r 24.04**)
- Under **CPA**:
 - SEE ABOVE

Case	Facts and outcome
<i>AON Risk Services Pty Ltd v Australia National University</i> (2009)	• Courts must always consider the PUBLIC INTEREST in the efficient use of Court resources when determining whether to grant indulgences, such as amending pleadings and corresponding adjournments • Parties NOT entitled to raise any arguable case at any stage of the proceedings, subject only to payment of costs (OVERTURNED IN JL HOLDINGS) • Whether a party should get leave to amend depends on Rules, all circumstances of case and other factors including: ○ Reason for, and length of, the delay in applying for amendment, including whether application made in good faith; ○ Prejudice other party will suffer if amendment allowed (and whether costs adequately compensate for that); ○ Stage in litigation at which application made; and ○ Prejudice of other litigants waiting trial dates or whose trial dates may be affected
<i>Yara Australia Pty Ltd & Ors v Oswal</i> [2013]	• Whelan J set aside orders of Eftim AsJ that the respondents provide security for costs of the applicants in the proceedings (security sought was \$20k-\$80k) • A number of parties sought leave to appeal – in that hearing the parties were represented by 5 firms of sols, five senior counsel, six junior counsel, and filed 6 lever arch folders of material (appeal books) • CoA refused leave, then invited submissions from parties on whether there had been a breach of OA in CPA s 24 (by parties, practitioners) • Inquiry focused on whether ○ there had been overrepresentation of a party by counsel ○ the material produced was unnecessary or excessive • OO s 24 – must use reasonable endeavours to ensure costs are reasonable and proportionate • To decide this, the courts consider the complexity and importance of the dispute, the amount in dispute and the proportionality between the two • For an appeal application, the parties (three applicants) were heavily represented – five senior counsel, six juniors, five law firms – and submitted over 2,700 pages of documentation • HELD that the sheer volume of material was excessive and unnecessary and ordered costs sanctions under s 29 of the CPA ○ Court of Appeal observed that the power to impose costs and other sanctions on parties who failed to comply with the OOs ‘has both compensatory and punitive elements’ (at [24]) ○ An important departure from the traditional concept that the central purpose of costs orders is purely providing indemnity to the successful party