

# REFORMING CIVIL PROCEDURE IN VICTORIA: TWO STEPS FORWARD AND ONE STEP BACK?

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*It is just a few months since the Civil Procedure Act 2010 came into force on 1 January 2011.<sup>1</sup> It is the only Act of Parliament in Victoria devoted entirely to civil procedure. Its opening section makes a bold clarion call seeking to reform and modernise procedures and processes relating to the resolution of civil proceedings.<sup>2</sup>*

## I INTRODUCTION

The *Civil Procedure Act 2010* ('CPA') gave effect to key recommendations of the Victorian Law Reform Commission ('VLRC') presented in its *Civil Justice Review Report* in May 2008.<sup>3</sup> The VLRC in setting strategic objectives for reforms also sought to implement reforms that would change the culture of litigation. The Explanatory Memorandum ('EM') which accompanied the CPA also took up the cultural aspect of civil procedure reform.<sup>4</sup> This was described as having two aspects. First, the building of a culture in which litigants were encouraged to resolve their cases before going to court where litigation is seen as a measure of last resort. Secondly, to build a culture within the court system encouraging litigants and lawyers to use reasonable endeavours to achieve early resolution of cases by agreement or where appropriate to narrow issues in dispute so that the cases that go to trial are where required by the interests of justice or where judicial determination is appropriate.

The CPA marks a significant change in the approach to the resolution of civil disputes by setting overall objectives. Once a dispute is entered in the civil litigation system it is subject to new procedures designed to assess the most expeditious and cost-effective way for that dispute to be resolved and for it to be actively case managed until disposition. In its original form the CPA also sought to deal with the resolution or narrowing of disputes before proceedings were issued by requiring the parties to take measures to resolve their dispute before resorting to litigation (pre-litigation requirements or 'PLRs').<sup>5</sup>

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<sup>1</sup> *Civil Procedure Act 2010* (Vic) ('CPA').

<sup>2</sup> *Ibid* s 1.

<sup>3</sup> Victoria Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

<sup>4</sup> Explanatory Memorandum, *Civil Procedure Bill 2010* (Vic).

<sup>5</sup> The pre litigation requirements were to come into effect from 1 July 2011 under the previous provisions.

The PLRs were removed by the passage of the *Civil Procedure and Legal Profession Amendment Act 2011*.<sup>6</sup> The amending Act came into effect on 30 March 2011.<sup>7</sup> The new coalition Government was concerned that they would add unnecessary costs to resolving disputes and potentially cause further delay in bringing disputes to conclusion. Thus one of the two cultural changes identified in the original *CPA*—the encouragement to disputants to resolve their disputes before issuing proceedings was repealed.<sup>8</sup> However, the removal of the PLRs does not mean that alternative dispute resolution will not be actively pursued and it should be noted that in addition to mediation being ordered in civil proceedings other measures may be directed. The Commercial Court Practice Note specifically contemplates that alternative dispute resolution can be ordered at any stage of a proceeding.<sup>9</sup> The *CPA* expressly provides that a court may order that a civil proceeding or part of a civil proceeding may be referred to appropriate dispute resolution.<sup>10</sup>

Since procedure is essentially a matter of process is the concept of ‘culture’ even relevant to procedural change? In order to assess this question I consider briefly the background to civil procedure and its genesis and evolution to the point reached with the *CPA*.

## II REFORMS IN 19<sup>TH</sup> CENTURY ENGLAND

The Australian legal system inherited from England the form of civil procedure followed by the English courts. In the late 19<sup>th</sup> century the English system was fundamentally reformed by enactments including the Judicature Act.<sup>11</sup> These reforms were described by Odgers as:

The Rules of Court made under the *Judicature Act* have defined the procedure, which is both simple and elastic. A Master now decides all interlocutory matters on a summons for directions, eg whether the action shall proceed with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case requires. Every amendment in any record, pleading or proceeding that is requisite for the purpose of deciding the real matter in controversy, can be made at any stage of the proceeding.<sup>12</sup>

There is much in this statement that we might accept today as case management. However, the statement is focussed on process rather than purpose. There is no call to the parties to resolve their dispute at an early stage without proceeding to trial or to narrow the issues. This was understandable when litigious process in the courts was the only dispute process. New measures of dispute resolution such as mediation had yet to emerge.

<sup>6</sup> *Civil Procedure and Legal Profession Amendment Act 2011* (Vic).

<sup>7</sup> Victoria, *Victoria Government Gazette*, No S 104, 29 March 2011, 1.

<sup>8</sup> It should be noted that at the Commonwealth level, with the recent enactment of the *Civil Dispute Resolution Act 2011* (Cth) on 24 March 2011, measures similar to the now defunct PLRs will be applied in Federal courts.

<sup>9</sup> Supreme Court of Victoria, Practice Note 1 of 2010—Commercial Court, December 2010, 8.9.5,10.

<sup>10</sup> *CPA* s 66.

<sup>11</sup> *Supreme Court of Judicature Act 1875*, 38 & 39 Vict, c 77.

<sup>12</sup> WB Odgers, ‘Changes in Procedure and in the Law of Evidence’ in *A Century of Law Reform* (MacMillan, 1901) 239.

Reform continued in the following decades in specific areas such as discovery enabling pre-action discovery and discovery from non party witnesses. In Victoria an entirely new set of Supreme Court Rules were adopted in 1986 incorporating many significant changes in procedure.<sup>13</sup> These Rules were adopted by Act of Parliament.<sup>14</sup> The 1986 Rules were the result of a major review of the Rules and removed much obsolete language and form and simplified many processes. Under the Rules the Court could in exercising any power thereunder endeavour to ensure that all questions in the proceeding were ‘effectively, promptly and economically determined’ and ‘give any direction or impose any term or condition it thinks fit’.<sup>15</sup> The importance of the 1986 Rules should not be forgotten.

The history of reform before the *CPA* was predominantly process driven with the main exception being the development of mediation by the courts and the profession. If there was a singular development in dispute resolution in Victoria in the late 20<sup>th</sup> century that could be described as a cultural change it was mediation.<sup>16</sup>

### III THE WOOLF REFORMS

In the United Kingdom came the Woolf enquiry into the civil justice system in 1994.<sup>17</sup> The Woolf reforms introduced from 26 April 1999 marked a departure from the previous approach of reformers driven by changes to process to one of philosophy and culture. The fundamental change that Lord Woolf directed attention to was:

Woolf proposed both explicitly that not only should there be structural and procedural reform but that our litigation culture had to change as well. If the discrete structural and procedural reforms were to achieve the end of enabling litigation to be conducted expeditiously and economically, litigation had to be carried out in a radically different way.<sup>18</sup>

Some 10 years later, Sir Anthony Clarke, the Master of the Rolls, asked what it was that the Woolf Reforms sought to do that differentiated them from the previous history of civil procedure reform. He observed:

<sup>13</sup> Neil Williams observed that the 1986 Rules constituted the most significant change to the practice of the Supreme Court since the judicature system was adopted in Victoria a century before, see Williams, *Supreme Court Civil Procedure Victoria* (Butterworths, 1987).

<sup>14</sup> *Supreme Court Act 1986* (Vic).

<sup>15</sup> *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14.

<sup>16</sup> For an overview of how mediation came to be accepted in the courts as a standard procedure see The Hon Marilyn Warren AC, ‘Should Judges be Mediators?’ (2010) 21 *Australasian Dispute Resolution Journal* 77.

<sup>17</sup> Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) 107.

<sup>18</sup> Sir Anthony Clarke, ‘The Woolf Reforms: a singular event or an ongoing process?’ in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2010) 13, 30.

How then did Woolf set about changing our litigation culture? How did he change the way the discrete reforms were implemented? As I see it, he did so in three ways: first through the introduction of active case management; secondly, through the introduction of the overriding objective; and thirdly, through the imposition of a duty on litigants and their representatives to assist the court in furthering the overriding objective.<sup>19</sup>

To carry out the Woolf reforms an entirely new set of rules of court were adopted by the English courts, the Civil Procedure Rules of 1999.<sup>20</sup>

#### IV REVOLUTIONARY REFORM—THE *CPA* OF 2010

Like the Woolf reforms in the United Kingdom the central reform comprised in the *CPA* directs a major shift in the philosophy of dispute resolution in the Victorian court system. It seeks to drive a change in the culture of dispute resolution applying not just to the courts and legal practitioners but to all participants in the process of the resolution of a dispute including the parties.

The *CPA* identifies an ‘overarching purpose’ to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute).<sup>21</sup>

Chief Justice Warren, speaking at a recent conference observed of the *CPA* that:

...the overarching purpose is a legislative command to which the courts are to give effect in the exercise of their powers. This imperative takes a number of novel dimensions. Specific obligations are imposed on a greater range of participants, with greater specificity as to their obligations than has ever been seen before. The obligations apply equally to the individual legal practitioner and to the practice of which they are a part, to the parties themselves, any representative acting for a party, and anyone else with the capacity to control or influence the conduct of a proceeding.<sup>22</sup>

The overarching purpose is to be given effect by the courts having regard to a list of objectives<sup>23</sup> that include:

- the just determination of the civil proceeding;<sup>24</sup>
- the public interest in the early settlement of disputes by agreement between parties;<sup>25</sup>
- the efficient conduct of the business of the court;<sup>26</sup>

<sup>19</sup> Ibid 13, 31.

<sup>20</sup> *Civil Procedure Rules 1998* (UK) SI 1998/3132.

<sup>21</sup> *CPA* s 7. A similar provision also exists under the *Federal Court of Australia Act 1976*, s 37 M, upon which there have been a number of decisions, see eg *Mijac Investments Pty Ltd v Graham* [2010] FCA 896; *Frazer –Kirk v David Jones Limited* [2010] FCA 1060.

<sup>22</sup> Chief Justice Warren, ‘The Duty Owed To the Court: The Overarching Purpose Of Dispute Resolution in Australia’ (Speech delivered at the Bar Association of Queensland Annual Conference, Gold Coast, 6 March 2011).

<sup>23</sup> *CPA* s 9.

<sup>24</sup> Ibid s 9(2)(a).

<sup>25</sup> Ibid s 9(2)(b).

<sup>26</sup> Ibid s 9(2)(c).

- the efficient use of judicial and administrative resources;<sup>27</sup>
- minimising any delay between commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps required;<sup>28</sup>
- timely determination of the civil proceeding;<sup>29</sup>
- dealing with the civil proceeding in a proportionate manner having regard to complexity, importance and amount in dispute.<sup>30</sup>

These objectives are wide and encourage the courts to be more active in directing the course of a dispute and in the expectation that the parties and their representatives will be cognisant of the overarching purpose and be bound to give effect to it on their part by reference to their overarching obligations.

- In pursuit of the overarching purpose the CPA contains a concept of overarching obligations<sup>31</sup> which apply not just to the legal practitioners conducting a civil dispute on behalf of their clients but also to:
  - any person who is a party;
  - any person who provides financial assistance to a party; and,
  - any person who is an expert witness.

## V THE OVERARCHING OBLIGATIONS

The overarching obligations are a fundamental and revolutionary feature of the *CPA* and are no less revolutionary than the ‘overriding objective’ which was the concept introduced under the Woolf reforms. The EM noted that the ‘primary objective of these proposals is to change the culture of litigation, rather than to punish misconduct’.<sup>32</sup> The overarching obligations create a model standard for the conduct of parties in the form of a positive set of obligations and duties.

The overarching obligations apply as soon as a party files its first ‘substantive document’ in a proceeding and they apply to all aspects of a civil proceeding including interlocutory proceedings and appeals.<sup>33</sup>

The overarching obligations prevail over any legal, contractual or other obligation which a person to whom the obligations apply may have to the extent that the obligations are inconsistent.<sup>34</sup> In the case of legal practitioners the obligations are additional to the other duties of legal practitioners under common law and statute.<sup>35</sup>

<sup>27</sup> Ibid s 9(2)(d).

<sup>28</sup> Ibid s 9(2)(e).

<sup>29</sup> Ibid s 9(2)(f).

<sup>30</sup> Ibid s 9(2)(g).

<sup>31</sup> Ibid ss 10-15.

<sup>32</sup> Memorandum, Civil Procedure Bill 2010 (Vic) 6.

<sup>33</sup> *CPA* s 3 (definition of ‘substantive document’).

<sup>34</sup> Ibid s 12.

<sup>35</sup> Ibid s 13.

### A *The content of the overarching obligations*

The thrust of the overarching obligations is contained in the provisions dealing with their content.<sup>36</sup> Persons to whom the overarching obligations apply must:

- act honestly at all times in relation to a civil proceeding;<sup>37</sup>
- not make a claim or response to a claim that is frivolous, vexatious, is an abuse of process or does not, on the factual and legal material available, have a proper basis;<sup>38</sup>
- not take a step in a proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding;<sup>39</sup>
- co-operate with the parties to the civil proceeding to avoid obstructive conduct;<sup>40</sup>
- not engage in conduct in relation to a civil proceeding which is misleading or deceptive or likely to mislead or deceive;<sup>41</sup>
- use reasonable endeavours to resolve a dispute by agreement including if appropriate dispute resolution;<sup>42</sup>
- if the dispute cannot be resolved by agreement try to resolve those issues that can be so resolved and to narrow the scope of the remaining issues in dispute;<sup>43</sup>
- ensure that costs incurred are reasonable and proportionate;<sup>44</sup>
- act promptly and minimise delay;<sup>45</sup>
- disclose to the other party all documents in the person's possession, custody or control of which the person is aware and which the person considers or ought reasonably to consider are 'critical' to the resolution of the dispute, such disclosure to occur at the earliest reasonable time after the person becomes aware of the existence of the document or such other time as the court may direct but privileged documents are excluded from being exchanged, this obligation is not to be confused with the disclosure of documents already disclosed at pre litigation stage or on discovery;<sup>46</sup>
- not to use information or documents provided on disclosure other than in connection with the civil proceeding.<sup>47</sup>

<sup>36</sup> Ibid pt 2.3.

<sup>37</sup> Ibid s 17.

<sup>38</sup> Ibid s 18.

<sup>39</sup> Ibid s 19.

<sup>40</sup> Ibid s 20.

<sup>41</sup> Ibid s 21.

<sup>42</sup> Ibid s 22.

<sup>43</sup> Ibid s 23.

<sup>44</sup> Ibid s 24.

<sup>45</sup> Ibid s 25.

<sup>46</sup> Ibid s 26.

<sup>47</sup> Ibid s 27.

## B *Disclosure*

The overarching obligation to disclose the existence of documents is an ongoing obligation for the duration of the civil proceeding<sup>48</sup> and it does not limit or affect a party's obligations in relation to discovery.<sup>49</sup> The elements of the obligation refer to the scope of documents covered and the times at which the disclosure must occur. The way in which the obligation is dealt with is in reality a reinforcement of the obligation to discover documents but does not impact on the discovery process.

The scope of the documents covered by this obligation is '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'.<sup>50</sup>

As noted above the concept of 'critical documents' is discussed in the EM:

The term 'critical documents' is intended to capture a class of documents considerably narrower than those required to be discovered, but is broader than the concept of 'decisive' documents. The test is meant to capture those documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case. The purpose of the early disclosure is to allow persons in dispute and their lawyers to have sufficient information upon which to have meaningful settlement discussions with the other side.<sup>51</sup>

This description departs from traditional notions of discovery where the concept of relevance to the issues in dispute was the touchstone. The scope of the overarching obligation is limited by the reference to the person being 'aware' of the documents thus not requiring a specific search to be made. It assumes that the person has knowledge of them and they are not, for example, lurking forgotten in a file. Awareness is a difficult consideration in the case of a corporation which can only act through its human agents. Of the numerous employees of a large corporation who might be said to be aware of documents such that the awareness is imputed to the corporation.

The awareness must also be that the documents are critical to the resolution of the dispute. In the case of an individual party it may be presumed that the individual will be aware of the existence of the dispute and that a document may be critical to the resolution of the dispute. In the case of a corporation steps will have to be taken to ensure that the relevant employees responsible for dealing with the dispute are cognisant of the obligation to disclose documents of which they are aware are critical to the resolution of the dispute.

<sup>48</sup> Ibid s 26(4)(a).

<sup>49</sup> Ibid s 26(4)(b).

<sup>50</sup> Ibid s 26(1).

<sup>51</sup> Explanatory Memorandum, Civil Procedure Bill 2010 (Vic) 12.

The requirement of ‘critical’ has both subjective and objective elements. The aspect of criticality means that the document must bear in some way on an issue in the dispute as, for example, containing an admission of liability. There is obviously room for reasonable minds to differ on whether a particular document is critical the dispute.

The other aspect of the overarching disclosure obligation is the times at which disclosure is to be made. It must occur at the earliest time after the person becomes aware of the existence of the document or such other time as the court may direct.<sup>52</sup> Also it is expressed to be an ongoing obligation for the duration of the civil proceeding. Therefore, one understands that at the start of the dispute the person must disclose the documents of which he or she is aware and thereafter those additional documents that the person subsequently becomes aware of, which, would include not just newly created documents but any documents subsequently coming into the awareness of the party.

### C *Overarching obligations certification*

At the time a party files the first substantive document in the proceeding he she or it must certify that the party has read and understood the overarching obligations and paramount duty.<sup>53</sup> A substantive document is defined in s 3 of the *CPA* and includes an originating motion or writ, complaint, defence, reply, counterclaim, third party notice but excludes a summons or interlocutory proceeding. In the case of a party represented by a litigation guardian or similar representative the certification may be given by the litigation guardian or representative.<sup>54</sup>

### D *Proper basis certification:*

The party’s legal representative must on the filing of the first substantive document certify, on the factual and legal material available, that each allegation of fact in the document has a proper basis; each denial in the document has a proper basis; and, there is a proper basis for each non admission. The practitioner must base his or her determination on a reasonable belief as to the truth or untruth of the allegation or denial, or in the case of any non-admission that the legal practitioner does not know, and therefore cannot say, whether a fact alleged or denied is true or untrue.<sup>55</sup>

This is an important change to the practice in relation to pleading. The distinction between pleading a denial and a non admission is thrown clearly into focus. In order to plead a denial the client must consider the allegation and instruct as to whether there is any basis for it. If the client has no knowledge of the allegation then a non admission may be made.

<sup>52</sup> *CPA* s 26(2).

<sup>53</sup> *Ibid* s 41.

<sup>54</sup> *Ibid* s 41(3): *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 4.09.

<sup>55</sup> *CPA* s 42.

If the client knows of the matter alleged the client must either admit or deny the allegation (with or without qualification or further pleading).

Because of the requirement to certify as to each allegation and denial it is no longer possible to plead a defence simply traversing each allegation made by the plaintiff and putting the plaintiff to proof of its case.<sup>56</sup> An illustration of this point is afforded by a Queensland case in which a similar rule was involved see *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited*.<sup>57</sup> The change seeks to define clearly those facts that are disputed and are to be proved by the plaintiff or the defendant (as the case may be) and to be proved at trial, those facts that are admitted and those facts about which there is a difference between the parties. The Rules of Court now contain provisions dealing with proper basis certification.<sup>58</sup>

### E *Urgent circumstances*

In urgent circumstances (such as the impending expiration of a limitation period) an document that is required to be filed may be filed without complying with the certification requirements but the person must file the relevant certification as soon as practicable after filing the document.<sup>59</sup>

Unless otherwise ordered by a court, a court may not prevent the commencement of civil proceedings merely because of a failure to comply with the certification requirements.<sup>60</sup>

### F *Case management*

The objective of the reform is to be assisted by case management by a court having regard to the overarching purpose and giving directions or making orders in the interests of the administration of justice and in the public interest.<sup>61</sup> This appears to be in line with the approach to case management recently enunciated by the High Court in *Aon Risk Services Australia Limited v Australian National University*.<sup>62</sup>

A court has a wide range of powers in relation to case management including-

- giving directions to ensure the proceeding is conducted promptly and efficiently;
- identifying at an early the stage the issues in dispute;
- deciding the order in which issues are to be resolved;

<sup>56</sup> Cf *Pinson v Lloyds and National Provincial Foreign Bank Ltd* [1941] KB 72. See also O'Bryan J in *Gordon v Gordon* [1948] VLR 57 at 58 'The defendant is not forced to make admissions and is entitled to deny or not admit the plaintiff's allegations. If he does that clearly he is allowed to do so, though he may eventually have to pay in costs for unnecessary denials or for improper refusals to admit'.

<sup>57</sup> [2009] 1 Qd R 116.

<sup>58</sup> See eg, *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 4.10.

<sup>59</sup> *CPA* s 44.

<sup>60</sup> *Ibid* s 45.

<sup>61</sup> *Ibid* s 47.

<sup>62</sup> [2009] HCA 27; (2009) 258 ALR 14.

- encouraging the parties to co-operate with each other in the conduct of the proceedings or to settle the whole or part of the civil proceeding;
- controlling the progress of the proceeding including fixing timetables, dealing with as many aspects as it can on the same occasion; dealing with the proceeding without the need for the parties to attend court; and, making use of technology;
- limiting the time for hearing including limiting the number of witnesses, limiting time for examination of witnesses, limiting issues or matters that may be subject to cross examination; and,
- considering whether the likely benefits of taking a particular step in a proceeding justify the cost in taking it.<sup>63</sup>

The court's wide ranging powers also extend to the pre-trial procedures.<sup>64</sup> An important power of a court under the powers conferred by the *CPA* is to make any direction or order it considers appropriate in relation to the conduct of the hearing. Such a direction or order may be made before a hearing commences or during the hearing and includes matters such as the order in which evidence is to be given and addresses made, limiting issues or matters that may be subject to examination or cross examination, limiting the length or duration of written and oral submissions, limiting the number of documents that may be tendered in evidence, the place, time and mode of trial, costs and so forth.<sup>65</sup>

Where delay had occurred in the progress of a proceeding to trial due to various failures on the part of a party falling short of meriting striking out the party's case the court made case management directions to ensure just, efficient, timely and cost-effective resolution of the issues in dispute.<sup>66</sup> In *Hodgson v Amcor* Vickery J gave an overview of the provisions of the *CPA* in light of the application and relevant considerations to its disposition.

The court may make an order directing a legal practitioner acting for a party to prepare a memorandum setting out – the estimated length of the trial, the estimated costs and disbursements, in the case of a memorandum to be given to a party the estimated costs that the party would have to pay to any other party if the party is unsuccessful and to give the memorandum to the court, or a party or both.<sup>67</sup>

Contravention of case management directions or orders can have significant consequences including the dismissal of the proceeding, striking out or limiting any claim or defence, striking out or amending any document, disallowing or rejecting any evidence and making orders as to costs.<sup>68</sup>

<sup>63</sup> *CPA* s 47.

<sup>64</sup> *Ibid* s 48.

<sup>65</sup> *Ibid* s 49.

<sup>66</sup> *Hodgson v Amcor Ltd* [2011] VSC 63.

<sup>67</sup> *CPA* s 50.

<sup>68</sup> *Ibid* s 51.

*G Experience divined from the cases thus far as to the overarching purpose and other matters under the CPA*

There are differing views among litigation practitioners about whether the *CPA* does represent a significant ‘cultural change’. Some senior practitioners tend to be a little dismissive stating that the changes really only reflect in the main what is already good litigation practice. Others tend to think the *CPA* needs to be considered in relation to the overall management of civil litigation and mention it in reference to almost every step in litigation. It has apparently been much referred to in various applications before the courts.

The answer lies somewhere in between the two extremes. It would be dangerous to consider that the *CPA* does no more than reflect existing good practice. Apart from the legislative prescription of the overarching purpose and the overarching obligations there are specific changes such as the certification requirements, the effect on pleading rules, summary dismissal (change to the test for)<sup>69</sup> and discovery.<sup>70</sup> These changes are significant.

An example of how the *CPA* might affect judicial thinking on case management is reflected in a decision made before the *CPA* even came into effect. In *Thomas v Powercor Australia Limited (Ruling No 1)*<sup>71</sup> J Forrest J was faced with an application for discovery by a defendant in a group proceeding where the defendant sought discovery for the purpose of ascertaining the quantum of potential group member claims. The information was sought to assist the defendant in participating sensibly in forthcoming mediation. His Honour noted that Finkelstein J had dealt with a similar situation in the Multiplex litigation but had expressed caution about the court becoming involved in the ‘essentially consensual process of mediation’.

Whilst J Forrest J was conscious of the difficulty in ordering discovery against group members whose identity is unknown and the passive role of group members he was also concerned with the Defendant’s problem. He was less cautious of being proactive in respect of facilitating and encouraging settlement. His Honour then reviewed the provisions of the then Civil Procedure Bill 2010. After this review he said:

Contrary to the submissions made on behalf of Mr Thomas, it is patently contrary to the purpose and intent of the *CPA* for a court to sit by passively and allow a case to proceed to what may be a lengthy trial of Mr Thomas’ claim on liability and quantum, without ensuring that there is adequate information available to both Mr Thomas and Powercor to achieve resolution, not only of Mr Thomas’ claim but also of the claims of the group members. Often in group proceedings the solicitors for the representative plaintiff provide particulars and, where necessary, supporting documentation relevant to the quantum of group members’ claims. The initial bulldog approach adopted by Mr Thomas’ lawyers is outmoded and runs contrary to the provisions of the *CPA*. This is a case in which the Court should exercise its

<sup>69</sup> Ibid pt 4.4.

<sup>70</sup> Ibid pt 4.3: see *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 28.01.1.

<sup>71</sup> [2010] VSC 489.

powers to ensure that there is adequate material available to Powercor to enable it to form a considered view as to the likely resolution of the group's claim.<sup>72</sup>

His Honour then referred to ss 33 ZF of the *Supreme Court Act* and 48(1) of the *CPA* as enabling a court to make necessary pre-trial orders in group proceedings to ensure that justice is done and to further the overarching purpose.

His Honour made orders for a selective sample of group members who had the same legal representative to provide discovery and particulars of loss. Thus 10 group members were to provide the information, namely five group members with the most significant claims and five group members with the least significant claims in terms of quantum.

Reference may also be made to decisions on similar provisions in other jurisdictions such as s 37 M of the *Federal Court of Australia Act 1976*, which also refers to an overarching purpose aimed at the 'just resolution of disputes'. That purpose is stated to include a number of objectives:<sup>73</sup>

- the just determination of all proceedings before the Court;
- the efficient use of judicial and administrative resources available for the purposes of the Court;
- the efficient disposal of the Court's overall caseload;
- the disposal of all proceedings in a timely manner; and,
- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

The Federal Court provision came into operation on 1 January 2010.<sup>74</sup>

Decisions concerning section 37M are instructive as to how the overarching purpose may inform judicial thinking. It has been used to assist in supporting a particular interpretation of Rules of Court where there may have been doubt as to their application in a particular instance. In *ZMB Australia Pty Ltd v Warne*<sup>75</sup> Justice Ryan identified sections 37 M and 37 P as one basis upon which he could find that a representative party was able to represent members of the class including enquiring into the possibility of a commercial resolution of an appeal including the negotiation and settlement of the appeal. His Honour differed from a fellow judge Finkelstein J regarding the powers of a representative under the FCR and expressed the view that if he was wrong on his interpretation of the Rules of Court his decision was otherwise supported by the recently enacted provisions of the *Federal Court of Australia Act*.<sup>76</sup>

<sup>72</sup> *Thomas v Powercor Australia Limited (Ruling No 1)* [2010] VSC 489, 49.

<sup>73</sup> *Federal Court of Australia Act 1976* (Cth) s 37M (2).

<sup>74</sup> Commonwealth, *Gazette General Notices*, No GN49, 16 December 2009, 3041.

<sup>75</sup> [2011] FCA 311.

<sup>76</sup> See *ASIC v GDK Financial Solutions Pty Ltd (in liq)* [2010] FCA 1092.

In New South Wales the *Civil Procedure Act 2005* identifies an overriding purpose.<sup>77</sup> The relevant provisions have been referred to by the New South Wales Court of Appeal in dealing with an appeal against a decision to allow renewal of a writ.<sup>78</sup> The Court noted that the provisions should be taken into account in informing it as to the exercise of a judicial discretion. In particular it noted that the elimination of delay and the completion of proceedings in a timely manner were to be taken into account. The Court considered that the trial judge had made a series of errors in the exercise of his discretion and accordingly exercised the discretion afresh and refused the renewal of the writ.

There are, however, limits on the extent to which the *CPA* and similar legislation can be used to support case management so as to displace other considerations. An example of one such limit is afforded by *Trevor Roller Shutter Services Pty Ltd v Crowe*.<sup>79</sup> In this case a dispute arose with respect to a ruling by a judge of the trial division to the effect that a proceeding should proceed to trial by judge alone notwithstanding that the defendant sought a trial by jury. The judge had regard to the provision of the rules dealing with jury trial and he also referred to the *Civil Procedure Act* (then still a bill). In the course of his ruling he observed:

Court and judicial resources are scarce. We no longer have the luxury of allowing parties to run their cases for twice the length of time they would otherwise take simply because one party or the other prefers a particular mode of trial. In my view, where a court identifies substantial time and cost savings that can be made by changing the mode of a civil trial, then, in the absence of some compelling reason not to do so, the court is bound to change the mode of trial to the more efficient, timely and cost-effective mode.<sup>80</sup>

The Court of Appeal disapproved this approach. In their analysis the *Juries Act* governed the situation and prevailed over any suggestion that R 47.02 of the Supreme Court Rules<sup>81</sup> altered the right of a party to require trial by jury.

As to the trial judge relying upon the *CPA* to support his ruling the Court said:

... it was not appropriate for the judge to take the *Civil Procedure Act* into account and, even if it had been a relevant consideration, nothing in s 7 of the *Civil Procedure Act* detracts from a party's prima facie entitlement to a trial by jury. As counsel for the appellant submitted, the overarching effect of efficiency articulated in s 7 of the *Civil Procedure Act* is little different to the object prescribed by Rule 1.14 of the Rules...costs and time savings which are no greater than what might be described as the inevitable consequence of trial before judge alone are not alone sufficient cause to warrant depriving a party of its prima facie entitlement to trial by jury.<sup>82</sup>

<sup>77</sup> *Civil Procedure Act 2005* (NSW) s 56.

<sup>78</sup> *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)* [2009] NSWCA 104.

<sup>79</sup> [2010] VSCA 536, on appeal [2011] VSCA 16.

<sup>80</sup> *Crowe v Trevor Roller Shutter Services Pty Ltd* [2010] VSC 536, 21.

<sup>81</sup> *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 47.02.

<sup>82</sup> *Trevor Roller Shutter Services Pty Ltd v Crowe* [2011] VSCA 16 [43].

The Court of Appeal also noted that the EM expressly stated that it was not intended that the Bill should change the status quo in regard to the court’s discretion as to mode of trial and that a party’s prima facie right to trial by jury would remain.<sup>83</sup>

Until the scope of the overarching purpose is filled out with the guidance of decisions by the courts there will be some uncertainty. An example of how reference to the *CPA* was used in an attempt to strike down the operation of a clause in a settlement agreement is afforded by *Johnson v AED Oil Limited*.<sup>84</sup> It was contended that a clause in a settlement agreement between some of the parties to a dispute restricting them so as not to ‘act against the interest of [other parties] save as compelled by a court of Australia’ was, inter alia, a breach of public policy or was a breach of the *CPA*. Sifris J did not accept the contention, noting that the clause had no application to parties subpoenaed to give evidence he rejected that it offended public policy or the *CPA*. There have been similar instances in cases in respect of s 37M of the Federal Court of Australia Act.<sup>85</sup>

## VI EFFECT ON CIVIL LITIGATION IN VICTORIA

Practitioners in Victoria have already embraced many changes in civil litigation practice in recent years not least of which has been the general reception and embracing of mediation and other alternative dispute resolution techniques. The measures introduced in the *CPA* will require significant attitudinal changes on the part of practitioners away from the exclusively party driven adversary process to a more co-operative model. It has been said that the result of the United Kingdom reform in 1999 has been the general support for pre-action conduct requirements in the promotion of openness, co-operation and early settlement and a reduction in satellite litigation. The reform has been attended with significant success in saving court time and reducing delays—but it has not, unfortunately, reduced costs of litigation.<sup>86</sup>

The changes will take time to work through and we may expect that:

- The judiciary will constructively embrace and apply the changes, this is clear from the way in which the Supreme Court judges and associate judges have already approached the application of the *CPA* to various matters;
- There will be judicial emphasis on the overarching purpose in relation to the approach to litigation—behaviour which is simply aimed at short term tactical advantage and generation of costs will be candidates for judicial attention as will careless behaviour that causes an adjournment due to a practitioner double booking or a key witness or document not being made available;

<sup>83</sup> Ibid.

<sup>84</sup> [2011] VSC 94.

<sup>85</sup> See *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; 267 ALR 623; *Mijac Investments Pty Ltd v Graham* [2010] 896; *Fraser-Kirk v David Jones Ltd* [2010] FCA 1060.

<sup>86</sup> See Sir Anthony Clarke, MR, *The Woolf Reforms: A Singular Event or an Ongoing Process?* 2 Dec 2008.

- The overarching purpose and overarching obligations may be expected to inform the judiciary on matters such as the exercise of judicial discretion, especially on matters of practice and procedure;<sup>87</sup>
- The profession will actively study and work with the new regime in the interests of clients as appears to have been the case thus far;
- There may be greater use of adverse costs orders, for example, where the conduct of a legal practitioner has led to an unnecessary adjournment of an application or trial;
- There will be greater use of protocols for certain types of dispute possibly including pre-action protocols emphasising the need for parties to seek a solution before proceedings are issued;
- There will be specific rules changes such as the certification requirements, and the discovery regime;
- We may expect more active case management aimed at the more efficient management of and disposition of cases;
- In the long run there will be attitudinal changes similar to those that have seen the acceptance of mediation over the last two decades as a standard process within the scope of a proceeding in court.

The success or otherwise of the *CPA* will depend upon how the overarching purpose of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute is achieved. How this is to be measured is not yet clear. Earlier disposition of many cases without trial is the most likely measure to be heralded as achieving the goal of efficiency. Reduction of delay in those cases that have to run to trial is another measure. Overall reduction in the costs of dispute resolution is another important goal. Statistics on these key indicators can be extracted so that in an empirical way the effect of the *CPA* over time can be measured. Changes in dispute resolution culture may be less easy to measure but should be identifiable such as greater co-operation between practitioners, reduction in satellite litigation, more targeted disclosure and discovery, better practice in relation to pleadings and disputes about pleadings and overall better case management towards early, cost-effective and efficient trial or disposition of civil proceedings.

<sup>87</sup> See, eg, *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)* [2009] NSWCA 104.

