Civil Procedure Reform in Victoria

Richard Manly SC

Case management, discovery and dispute resolution

The *Civil Procedure Act 2010* (Vic) ("**the Act**") received royal assent on 24 August 2010 and is due to come into effect on 1 January 2011.

The main purpose of the Act is to reform and modernise the laws, practices, procedure and processes for the resolution of civil disputes which may lead to civil proceedings in the courts and in respect of the initiation of proceedings in the courts (Section 1).

The Act aims to change the culture of litigation in Victoria to promote a more non-adversarial model of dispute resolution through:

i) earlier disclosure of information;
ii) greater use of Appropriate Dispute Resolution (Section 3); and
iii) improved case management powers for the court.

The Act aims to redress the imbalance in the civil justice system to achieve essential goals of accessibility, affordability, proportionality, timeliness and getting to the truth quickly and easily.

The Act gives substantial effect to the recommendations of the Victorian Law Reform Commission presented in the **Civil Justice Review Report 14** published in March 2008.

Once a dispute is entered into the civil litigation system it will be subject to new procedures (Chapters 3, 4) designed to assess the most expeditious and cost effective way for that dispute to be resolved including by Appropriate Dispute Resolution (Part 5) and for it to be actively case managed by the relevant court until disposition.

The Act marks a significant change in approach to the resolution of civil disputes by setting overall objectives (Chapter 2) and seeking to resolve many disputes before they are entered into the civil litigation system (Chapter 3).

The Act is also aimed at promoting the just, efficient, timely and cost effective resolution of disputes and applies to all Victorian Courts, but not to VCAT or other Tribunals (Section 1(1)(c)).

The 'Overarching Purpose' (Section 7) of the Act and Rules of Court in relation to civil proceedings that will be a foundational guide to the courts when exercising civil jurisdiction is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The Courts Powers with Respect to Case Management

In 2006 James Spigelman[1] said:

> *"The objective of case management is to reduce delays and minimise the costs of litigation. Litigants who are dilatory in their preparations, or who otherwise take up too much of the court's*

[1] Civil Justice Review Report 14 p291

> *time, waste public resources and exacerbate the delays which other litigants have to suffer. It is perfectly appropriate for judges to take steps to ensure that litigation is conducted efficiently and expeditiously"*

And in 1997 in the UK, Sir Peter Middleton[2] said:

> *"It is no justice if a decision can only be reached after excessive delay, or at a cost that is unaffordable to the parties or disproportionate to the issues at stake. A change in the balance from excessive thoroughness to increased speed and less costs is likely to result in a net improvement in the quality of justice in a world where resources are limited"*.

The objectives of the reforms are to be assisted by case management by a court having regard to the Overarching Purpose (Section 7)and giving directions or making orders in the interests of the administration of justice and in the public interest (Section 47). This appears to be in line with the approach to case management enunciated by the High Court in **Aon Risk Services Australia Ltd v Australian National University** (2009) 239 CLR 175. In that case the High Court sent a clear message that case management principles are important in ensuring that the interests of justice are served by minimising cost and delay for parties involved in litigation. The court's decision endorsed the current trend of increased utilisation of case management tools to improve access to justice, and the importance of the efficient and quick resolution of litigation in the modern era.

Part 4.2 (Sections 47-53) of the Act is the starting point for Case Management. The powers given to the court are all encompassing and in the broadest of language. They give the judges real 'clout' to aggressively manage cases. The Act provides powerful sanctions the Judge can impose in the event of default.

Part 4.2 of the Act empowers the courts to more acutely manage cases, where emphasis is given to planning the most effective way to resolve the dispute, rather than leaving it to the parties to determine the process for themselves.

The primary objective of the case management provisions is to make it clear that the courts have the power to make appropriate orders and impose reasonable limits to enable them to better or actively manage the conduct of the proceedings, thereby reducing costs and delay.

These provisions will also resolve any argument about the limits of existing rule – making powers and will overcome any constraints on the exercise of case management powers that exist at common law.

The judicial powers of case management, Overarching Purpose and active case management are provided for in Section 47 which provides that, a civil proceeding is managed and conducted in accordance with the Overarching Purpose.

Pursuant to Section 47(3) the court may actively case manage a civil proceeding by giving any direction or make any order it considers appropriate, including orders and directions made in the interests of the administration of justice or in the public interest. For example:

[2] Civil Justice Review Report 14 p291

- give directions to ensure the proceeding is conducted promptly and efficiently;
- identifying at an early stage the issues in dispute;
- deciding the order in which issues are to be resolved;
- encourage the parties to co-operate with each other in the conduct of the proceeding or to settle the whole or part of the civil proceeding;
- control 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;
- limit 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 of taking it.

A court may impose any reasonable limits, restrictions or conditions in respect of civil proceedings and the conduct of the parties.

Section 48 deals with the Court's power to order and direct pre-trial procedures. It provides the court with power to make any order or give any direction it considers appropriate to further the Overarching Purpose in relation to pre-trial procedures.

Section 48(2) lists some of the matters about which orders or directions may be made, namely:

- the conduct of the proceedings;
- timetables or timelines;
- the use of Appropriate Dispute Resolution;
- the attendance of parties and practitioners at case management conferences;
- defining issues by pleadings or otherwise including requiring parties or their legal practitioners to exchange memoranda or take the steps to clarify questions; and
- the attendance of parties or their practitioners before a judicial officer for a conference to:
    - satisfy the judicial officer that all reasonable steps to achieve resolution of the issues in dispute have been taken; or
    - otherwise clarify the real issues in dispute to enable appropriate directions to be given for the further conduct of the dispute; or
    - otherwise shortening the time taken in preparation for the trial and at the trial.

Section 49 provides for the Court's powers to order and direct trial procedures and the conduct of the hearing.

Such directions or orders may be given or made at any time before a hearing commences or during that hearing.

Section 49(3) provides important powers to a court 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 or oral submissions, limiting the number of documents that may be tendered in evidence, and the place, time and mode of trial, costs etc.

Section 50 permits the court to make orders at any time in a legal proceeding 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, and in the case of a memorandum to be given to a party, an estimate of the costs that the party would have to pay to any other party if the party is successful, and to give the memorandum to the court, or a party or both.

Section 51 provides that 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 rectifying any evidence and making orders as to costs.

Section 52 provides that the Court may revoke or vary any direction or order made by it under this Part.

Section 53 addresses the relationship of this Part with other powers of the Court, and provides that nothing in Part 4.2 limits any other power a Court may have, regardless of the source of that power.

Case management powers under the Act (ie: Part 4.2) apply to all civil proceedings on or after commencement of the Act (Section 74) regardless of whether the civil proceeding has commenced prior to that date.

The Discovery Process

Discovery of documents is a critical element of fact finding, truth seeking and decision making. However, it has become a hugely contested process particularly in complex civil litigation[3].

Discovery has been strongly criticised by the judiciary throughout Australia and in the press, particularly in relation to a number of high profile cases, eg: **Seven Network Ltd v News Ltd** (2007) FCA 1062.

The main concerns with discovery relate to its expense, scale and delay as well as the abuse of discovery obligations.

The importance of the discovery of documents is emphasised in Part 4.3 of the Act. Discovery is a process that has been through various changes in recent years. Old rules have been removed to widen the scope of discovery, for example, pre-action discovery and third party discovery were introduced to overcome the effect of the traditional rules.

The feeling now is that discovery must be more tailored to suit particular types of disputes and that the courts should assert more control over the process.

Part 4.3 (Section 54-59) of the Act is the starting point.

[3] See generally Civil Justice Review, Report 14, Law Reform Commission of Victoria, Chapter 6, p 426

Section 54 states that unless a court otherwise orders, discovery of documents is to be in accordance with the Rules of Court.

Supreme Court Rules (Chapter 1 Amendment 18) 2010 – New Discovery Rules (SR No. 53/2010) is due to come into force on 1 January 2011 (see **copy attached**). The New Discovery Rules will amend Rule 29 of Chapter 1 of the General Civil Procedure Rules 2005 insofar as they deal with the scope of discovery, the notice for discovery, the affidavit of documents, orders for general discovery, and orders for expanded discovery.

Importantly, the New Discovery Rules apply to any proceeding commenced on or after 1 January 2011.

Section 55 provides that a court may make any order or give any direction in relation to discovery which it considers necessary or appropriate. Section 55(2) sets out a list of the types of directions or orders that may be made, for example:

- discovery of documents in classes or samples;
- relief against provision of discovery;
- limiting the obligation of discovery to a class of documents or in relation to specified facts or issues;
- discovery in stages;
- requiring discovery of specified classes of documents prior to the close of pleadings;
- expanding a party's obligations to provide discovery;
- requiring a list of documents to be indexed or arranged in a particular way;
- requiring discovery or inspection by a particular time;
- relieving a party from providing an affidavit of discovery; and
- modifying or regulating discovery in any other way the court considers fit.

In addition, Section 55(3) provides that incidental orders may be made with respect to facilities for inspection and copying of documents or explaining the way documents are arranged and helping to locate and identifying particular documents or classes of documents.

Section 56 provides that the court may sanction parties for failing to comply with their discovery obligations, and any failure to comply with any order or direction in relation to discovery, or conduct that is intended to delay, frustrate or avoid discovery of discoverable documents.

Section 56(2) lists some of the directions or orders that may be made, for example:

- initiating contempt of court proceedings;
- adjourning the proceeding and imposing costs of the adjournment;
- making indemnity costs orders against any party or legal practitioner who is responsible for or aids and abets any conduct that delays, frustrates, or avoids discovery of discoverable documents;
- preventing a party taking any step in the proceeding;
- prohibiting or limiting the use of documents in evidence;
- awarding compensation for financial or other loss arising out of conduct that delays, frustrates or avoids discovery;
- compelling any person to give evidence in connection with such conduct; and
- dismissing any part of the claim or defence.

As David Bailey points out the courts already have extensive powers with respect to sanctions for breach of the discovery obligation (see R24.02, R29.11, R29.12(1), R29.14, R61.16.1, and Order 75 and the inherent jurisdiction).

However, the new provision gathers such powers together and relates them to the parties' responsibilities in the context of the new litigation culture[4].

Section 57 is an important new provision and provides that subject to a court order otherwise, a party may cross examine, or seek leave to conduct an oral examination of the deponent of an affidavit of documents if there is a reasonable basis for the belief that the other party may be misinterpreting a party's discovery obligations or failing to discover discoverable documents.

Section 58 provides that nothing in this Part derogates from the operation of Division 9 of Part III of the **Evidence (Misc Provisions) Act** *1958* which deals with the situation where a document is unavailable for use as evidence.

Section 59 provides that the powers of a court under this Part are in addition to, and do no derogate from, any powers a court also has under Rules of Court in relation to discovery or disclosure of documents. David Bailey expresses the view that:

> "*Much will need to be spelt out in the Rules dealing with discovery if the proposed amendments are to provide a constructive reform of discovery*"[5].

The disclosure and discovery provisions apply to all proceedings on the date from which Part 4.3 commences (Section 75) regardless of whether the civil proceeding has commenced prior to that date.

The Use of ADR Process

It is thought that the extension and enhancement of ADR will go some way towards solving, or at least alleviating, the present difficulties associated with the civil justices system, such as delay and expense[6].

The availability of additional ADR options (beyond mediation) was seen by the Victorian Law Reform Commission as assisting the courts to effectively and efficiently manage the diverse range of disputes it is called upon to resolve.

The courts have the capacity to order the parties to participate in non-binding ADR with or without their consent (Section 66(2)).

Chapter 5 (Section 66-69) of the Act is the starting point.

Section 66 provides that a court may order that the whole or any part of a civil proceeding be referred to Appropriate Dispute Resolution (Section 3).

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[4] Civil Procedure Victoria Bulletin 146 "*Legislative Developments*" by David Bailey p6.
[5] op cit p6
[6] see generally Civil Justice Review Chapter 4

Pursuant to Section 3 "*Appropriate Dispute Resolution*" means a process attended or participated in, by a person involved in a civil dispute or a party for the purposes of negotiating a settlement of the civil dispute or the civil proceeding or resolving or narrowing the issues in dispute, including, but not limited to:

- mediation;
- early neutral evaluation;
- judicial resolution conference;
- settlement conference;
- reference of a question, a civil proceeding or part of a civil proceeding to a special referee;
- expert determination;
- conciliation; and
- arbitration.

Section 66(2) enables such an order to be made without consent of the parties if the type of Appropriate Dispute Resolution that the civil proceeding (or part thereof) is referred to is not arbitration, special reference, expert determination or any other type of process which results in a binding outcome.

It is intended that the court will have the power to refer a proceeding to mediation, early neutral evaluation, judicial resolution conferences (Section 3), subject to an order of the court having regard to the interests of justice and fairness.

Pursuant to Section 3 "*Judicial Resolution Conference*" means:

- in relation to the Supreme Court, County Court and Magistrates Court, a resolution process presided over by a judge, an associate judge, magistrate or judicial registrar (as appropriate) for the purposes of negotiating a settlement of a dispute including, but not limited to mediation, early neutral evaluation, settlement conference and conciliation.

Section 68 provides for the immunity of judicial officers in relation to Judicial Resolution Conferences.

Section 69 provides that the powers of a court under this Chapter are in addition to, and do not derogate from, any powers a court has under any other Act or the Rules of Court in relation to Appropriate Dispute Resolution.

Chapter 5 applies in relation to all civil proceedings commenced on or after the commencement of the Chapter (Section 77) regardless of whether the civil proceeding has commenced prior to that date.

Conclusion

The measures introduced in the Act will require significant attitudinal changes on the part of practitioners away from the exclusively party driven adversary process to a more co-operative model.

David Bailey[7] has noted:

> "*It has been said that one result of the UK reform of 1999 has been the general support for pre-action conduct requirements in the promotion of openness, co-operation and early settlement*

[7] op cit p7

and that the reform has been attended with significant success in saving court time and reducing delays".

Bibliography

i) Civil Procedure Victoria Bulletin No. 146 Legislative Developments by David Bailey

ii) Victorian Law Reform Commission, Civil Justice Review Report 14

iii) Civil Procedure Bill 2010 Explanatory Memorandum

iv) Supreme Court (Chapter 1 Amendment No. 18) Rules 2010 – new Discovery Rules (SR No. 53/2010)

Supreme Court (Chapter I Amendment No. 18) Rules 2010

S.R. No. 53/2010

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STATUTORY RULES 2010

S.R. No. 53/2010

Supreme Court Act 1986

Supreme Court (Chapter I Amendment No. 18) Rules 2010

The Judges of the Supreme Court make the following Rules:

1 Object

The object of these Rules is to amend Chapter I of the Rules of the Supreme Court in relation to the discovery of documents.

2 Authorising provisions

These Rules are made under section 25 of the **Supreme Court Act 1986** and all other enabling powers.

3 Commencement

These Rules come into operation on 1 January 2011.

4 Principal Rules

In these Rules, the Supreme Court (General Civil Procedure) Rules 2005[1] are called the Principal Rules.

5 New Rule 29.01.1

After Rule 29.01 of the Principal Rules **insert**—

"**29.01.1 Scope of discovery**

(1) Unless the Court otherwise orders, discovery of documents pursuant to this Order is limited to the documents referred to in paragraph (3).

(2) Paragraph (1) applies despite any other rule or law to the contrary.

(3) Without limiting Rules 29.05 and 29.07, for the purposes of this Order, the documents required to be discovered are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given—

(a) documents on which the party relies;

(b) documents that adversely affect the party's own case;

(c) documents that adversely affect another party's case;

(d) documents that support another party's case.

(4) Notwithstanding paragraph (3)—

(a) if a party giving discovery reasonably believes that a document is already in the possession of the party to which discovery is given, the party giving discovery is not required to discover that document;

(b) a party required to give discovery who has, or has had in his, her or its possession more than one copy, however made, of a particular document is not required to give discovery of additional copies by reason only of the fact that the original or any other copy is discoverable.

(5) For the purposes of paragraph (3), in making a reasonable search a party may take into account—

(a) the nature and complexity of the proceeding;

(b) the number of documents involved;

(c) the ease and cost of retrieving a document;

(d) the significance of any document to be found; and

(e) any other relevant matter.".

6 Notice for discovery

In Rule 29.02(1) of the Principal Rules for "relating to any question raised by the pleadings" **substitute** "and which, in accordance with Rule 29.01.1, are required to be discovered".

7 Affidavit of documents

At the end of Rule 29.04 of the Principal Rules **insert**—

"(2) If a party required to give discovery in accordance with Rule 29.01.1 does not, in making a reasonable search as required by Rule 29.01.1, search for a category or class of document, the party must include in the affidavit of documents a statement of—

(a) the category or class of document not searched for; and

(b) the reason why.".

8 New Rules 29.05.1 and 29.05.2

After Rule 29.05 of the Principal Rules **insert**—

"**29.05.1 Order for general discovery**

At any stage of a proceeding, the Court may order any party to give discovery in accordance with Rule 29.01.1.

29.05.2 Order for expanded discovery

(1) At any stage of a proceeding, the Court may, by order, expand a party's obligation to give discovery beyond that required by Rule 29.01.1.

(2) Without limiting any power of the Court, an order under paragraph (1) may specify any document or class of document to which the expanded obligation relates.".

9 New Rule 29.17

After Rule 29.16 of the Principal Rules **insert**—

"**29.17 Transitional provision—Supreme Court (Chapter I Amendment No. 18) Rules 2010**

The amendments made to this Order by the Supreme Court (Chapter I Amendment No. 18) Rules 2010 apply to any proceeding commenced on or after 1 January 2011.".

10 Form 29B—affidavit of documents

(1) In Form 29B of the Principal Rules—

(a) in clause 1 for "relating to the questions in this proceeding enumerated in Schedule 1" **substitute** "enumerated in Schedule 1 which are required to be discovered";

(b) in clause 3 for "document relating to the questions in the proceeding enumerated in Schedule 2" **substitute** "documents enumerated in Schedule 2 which would have been required to be discovered";

(c) in clause 5 for "relating to any question in the proceeding" **substitute** "required to be discovered".

(2) In Form 29B of the Principal Rules, after clause 5 **insert**—

"*6. In making a reasonable search as required by Rule 29.01.1 of Chapter I of the Rules of the Supreme Court, I did not search for the following category or class of document [*specify which category or class of document for which no search was made*].

*7. The reason why I did not make a search for the category or class of documents referred to in clause 6 is [*specify reason*].".

(3) In Form 29B of the Principal Rules at the end of the Form **insert**—

"*Delete if not applicable.".

Dated: 24 June 2010

M. L. WARREN, *C.J.*

CHRISTOPHER MAXWELL, *P.*

PETER BUCHANAN, *J.A.*

GEOFFREY NETTLE, *J.A.*

DAVID ASHLEY, *J.A.*

MARCIA NEAVE, *J.A.*

PHILIP MANDIE, *J.A.*

BERNARD D. BONGIORNO, *J.A.*

D. L. HARPER, *J.A.*

H. R. HANSEN, *J.*

D. J. HABERSBERGER, *J.*

R. S. OSBORN, *J.*

STEPHEN KAYE, *J.*

ELIZABETH HOLLINGWORTH, *J.*

KEVIN H. BELL, *J.*

ANTHONY CAVANOUGH, *J.*

TONY PAGONE, *J.*

JAMES JUDD, *J.*

EMILIOS KYROU, *J.*

DAVID F. R. BEACH, *J.*

JENNIFER DAVIES, *J.*

KARIN EMERTON, *J.*

ENDNOTES

[1] Rule 4: S.R. No. 148/2005. Reprint No. 2 incorporating amendments as at 1 November 2009. Reprinted to S.R. No. 109/2009 and subsequently amended by S.R. Nos 60/2009, 97/2009, 132/2009, 144/2009, 146/2009, 22/2010 and 23/2010.