LEGAL UPDATE

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'The overarching purpose' – legislative changes in Victoria and New South Wales aim to promote alternate dispute resolution and to further enhance the resolution of disputes in a just, timely and cost effective manner.

Introduction

The Victorian and New South Wales legislators have recently introduced legislation aimed at strengthening their respective courts' ability to facilitate the just, efficient, timely and cost effective resolution of civil disputes.

The changes in both States indicate a desire to move toward a less adversarial approach to civil litigation by resolving disputes or narrowing the issues before they reach court, through alternative dispute resolution.

Victoria has introduced various overarching obligations to facilitate the just, timely and cost effective resolution of disputes, including using reasonable endeavours to resolve the dispute, or any issues in dispute, by agreement or appropriate dispute resolution processes.

In New South Wales, pre-litigation requirements have been introduced which impose duties on the parties to take reasonable steps to resolve a dispute, or to clarify and narrow the issues in dispute, before the commencement of civil proceedings.

The new legislation in Victoria also introduced pre-litigation requirements which were due to commence on 1 July 2011, but with the introduction of the *Civil Procedure and Legal Profession Amendment Bill 2011* (Vic) it appears Victoria's pre-litigation landscape is about to change.

Interestingly, the new obligations imposed by the legislative changes in both States are imposed on legal practitioners, the parties involved in the proceedings and extend to any person who provides financial or other assistance to any party, insofar as they exercise direct or indirect control of the proceeding or a party.

Victoria

On 1 January 2011, the new *Civil Procedure Act 2010* (Vic) (the '**Victorian Act**') came into force in Victoria. The Victorian Act aims to:

a) reform and modernise the laws, practice, procedure and processes relating to the resolution of civil disputes; and

b) provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.

The Victorian Act proposes to do this by, among other things, providing for:

a) overarching obligations for *all* participants in civil proceedings to improve standards of conduct in litigation;

b) the facilitation of the resolution of disputes before civil proceedings are commenced;

c) the enhancement of case management powers of the courts; and

d) the further enhancement of appropriate dispute resolution processes.

The Victorian Act applies to all parties in civil disputes in Victorian Courts, excluding the Victorian Civil and Administrative Tribunal, irrespective of whether the proceeding was commenced prior to 1 January 2011, unless the Court has begun to hear and determine that proceeding.

The key tenets of the Victorian Act are the introduction of:

a) an 'overarching purpose';

b) a 'paramount duty'; and

c) 'overarching obligations'.

The Overarching Purpose

The overarching purpose of the Victorian Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

The Court must seek to give effect to the overarching purpose in the exercise of its powers. In seeking to give effect to the overarching purpose, the Court may have regard to matters such as:

a) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;

b) the degree to which a party has complied with any overarching obligation; and

c) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes.

The Paramount Duty

The Victorian Act also introduces a 'paramount duty', which applies to each person to whom the overarching obligations apply and involves a duty to the court to further the administration of justice in relation to any civil proceeding.

The Overarching Obligations

The Victorian Act introduces ten 'overarching obligations' in relation to the conduct of civil proceedings in Victoria, which are components of the paramount duty.

The overarching obligations include duties to:

a) act honestly and not make any claim or response that is frivolous, vexatious or does not have proper legal and factual basis;

b) not take any step in the proceedings unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding;

c) cooperate with the parties and the court;

d) not engage in conduct that is misleading or deceptive or likely to mislead or deceive;

e) unless it is not appropriate to do so (i.e. it is not in the interests of justice to do so or the dispute is of such a nature that only judicial determination is appropriate):

   i) use reasonable endeavours to resolve the dispute by agreement or appropriate dispute resolution processes;

   ii) use reasonable endeavours to resolve by agreement any issues in dispute which can be resolved in that way and narrow the scope of any remaining issues;

f) use reasonable endeavours to ensure that legal costs and other costs incurred are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute; and

g) act promptly and minimise delay.

Subject to the paramount duty set out above, the overarching obligations prevail over any legal, contractual or other obligation which a litigating party may have, to the extent that these obligations are inconsistent.

Who are the obligations imposed on?

Notably, the overarching obligations apply not only to the lawyers but also to the parties involved in the litigation and any person who provides financial or other assistance to any party, insofar as they exercise direct or indirect control of the proceeding or a party, for example, insurers and litigation funders.

As a result, the Victorian Act represents the first Australia jurisdiction to enact statutory conduct obligations on *all* participants who have the power to influence the course of a proceeding.

The overarching obligations commence as soon as a party files its first document in a proceeding and apply to all aspects of a civil proceeding, including appropriate dispute resolution, interlocutory processes and appeals.

Pre-litigation requirements

The Victorian Act provides that, for proceedings commencing after 1 July 2011, parties to a proceeding must also comply with a number of pre-litigation requirements, including taking reasonable steps to resolve a dispute, or to clarify and narrow the issues in dispute, before the commencement of civil proceedings (having regard the party's situation and the nature of the dispute).

However, the new Victorian Government, on 10 February 2011, signalled in the second reading speech for the *Civil Procedure and Legal Profession Amendment Bill 2011* (Vic) (the '**Bill**'), the repeal of all the pre-litigation requirements in the Victorian Act.

The Government's rationale behind introducing the Bill is to remove unnecessary costs, complexity and delay in bringing legal proceedings and to ensure all disputants, such as small to medium businesses, have access to the Courts. The

Government is also concerned that mandatory pre-litigation requirements would enable some parties to attempt to postpone or frustrate proceedings.

The Bill is a significant and interesting development in the litigation environment in Australia. If the Bill becomes law, the Victorian Government will have chosen to move away from the mandatory pre-litigation requirements that are being introduced in the federal sphere, with the introduction of the *Civil Dispute Resolution Bill 2010* (Cth), and in New South Wales (discussed below). Although, the Courts in Victoria will be able to continue to use their case management powers to encourage the parties to resolve disputes by way of a formal or informal mediation process.

Certification, contravention and non-compliance

All parties to the proceedings will be required to certify that they have read and understood the overarching obligations and the paramount duty.

If an overarching obligation is breached, the Court may take the breach into account in exercising any of its powers and in its discretions as to costs. The Court is also able to impose penalties for breaches, including requiring a lawyer to personally bear any costs order made by the Court for breaches of the obligation.

The Victorian Act also contains provisions that require all lawyers to certify whether pre-litigation requirements have been complied with, however these provisions are set to be repealed under the Bill.

Non-compliance with the above certification requirements under the Victorian Act do not prevent proceedings being commenced, but can be taken into consideration by the Court in determining costs in the proceedings, or making any other order.

Similarly, if a document is required to be filed as a matter of urgency, for example, to comply with a limitation period or an urgent interlocutory application, that person may file the document without complying with the certification requirements.

'Appropriate' Dispute Resolution

Interestingly, the Victorian Act has used the term 'appropriate dispute resolution' instead of the term alternate dispute resolution. In the second reading speech, the former Attorney General of Victoria, Rob Hull stated, the government has used the term 'appropriate dispute resolution' because '"ADR" should become the appropriate vehicle for dispute resolution, not an alternative to "mainstream" litigation'.

The Victorian Act allows the court to make an order, at any stage in the proceeding, referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution. This includes the power to order the parties to participate in non-binding appropriate dispute resolution, without their consent.

Although these provisions are essentially facilitative and complement the *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic) which already empowers the courts to make such orders, the aim is to encourage the courts to make more use of the variety of appropriate dispute resolution processes available to it and to build a culture within the court system that supports and encourages litigants to resolve their disputes outside the courts.

New South Wales

On 7 December 2010, the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) (the '**New South Wales Act**') was assented to, with the purpose of improving the efficiency and operation of the New South Wales justice system. The New South Wales Act, which will commence on a date to be proclaimed, makes amendments to several New South Wales acts, including the *Civil Procedure Act 2005* (NSW) (the '**Civil Procedure Act**').

The amendments to the Civil Procedure Act are found in Schedule 6.2 of the New South Wales Act and are specifically aimed at encouraging people to resolve their disputes outside the Court system, increasing the role of alternative dispute resolution and promoting a shift away from adversarial litigation.

In the second reading speech, The Hon. John Hatzistergos, Attorney General, commented that the reforms are aimed at 'extend(ing) the overriding purpose in section 56 of the Civil Procedure Act, which is the "just, quick and cheap resolution of the real issues" to civil disputes before they are commenced in court'.

These changes are the result of consultation on the New South Wales Government's Alternative Dispute Resolution Blueprint, which proposed recommendations to make it easer to resolve civil disputes.

Pre-litigation requirements

The New South Wales Act inserts 'pre-litigation requirements' into the Civil Procedure Act. These pre-litigation requirements impose a duty on each person involved in a civil dispute to take reasonable steps, having regard to the person's situation, the nature of the dispute (including the

value of any claim and complexity of the issues) and any applicable pre-litigation protocol, to:

a) resolve the dispute by agreement, or

b) clarify and narrow the issues in dispute, in the event that proceedings are commenced, in a way that is consistent with the overriding purpose, being the just, quick and cheap resolution of the real issues in the proceedings.

Reasonable steps include, but are not limited to, the following:

a) notifying (or responding appropriately to) the other party in relation to the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;

b) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;

c) considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes; and

d) taking part in alternative dispute resolution processes.

Pursuant to the New South Wales Act, parties involved in a dispute are not permitted to unreasonably refuse to participate in genuine and reasonable negotiations or alternate dispute resolution processes.

Dispute Resolution Statement

As part of the pre-litigation requirements, plaintiffs and defendants will be required to file dispute resolution statements.

Plaintiffs will be required to file a dispute resolution statement when filing an originating process to commence a matter which must specify the steps taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant.

If no such steps have been taken, the dispute resolution statement must also outline the reason why no steps were taken, which may relate (but are not limited) to:

a) the urgency of the proceedings; and

b) whether the safety or security of any person or property would have been compromised by taking such steps.

A defendant who has been served with a copy of the plaintiff's dispute resolution statement will be required, in turn, to file their own dispute resolution statement at the time they file their defence in the proceedings. The defendant's dispute resolution statement is to state whether the defendant agrees or disagrees with the dispute resolution statement filed by the plaintiff and, if the defendant disagrees, they will be required to specify the reasons why and also any other reasonable steps that they believe could usefully be undertaken to resolve the dispute.

Who are the duties imposed on?

Similarly to the Victorian Act, the amendments affect *all* participants in the proceedings, in that:

a) any solicitor or barrister representing the party in the proceedings; and

b) any person with a relevant interest in the proceedings, being a person who:

   i) provides financial assistance or other assistance to any party to the proceedings; or

   ii) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings,

   are statutory obliged to not, by their conduct, cause a person involved in a civil dispute to breach their duty to take reasonable steps to resolve the dispute by agreement or clarify and narrow the issues in dispute.

The reforms also impose additional duties on legal practitioners. These are the requirements to:

a) inform clients at the outset about the applicability of the pre-litigation requirements to their dispute (including the need to file a dispute resolution statement); and

b) advise their client about the alternatives to the commencement of civil proceedings (including alternate dispute resolution processes) that are reasonably available to them in order to resolve the dispute or narrow the issues in dispute.

Non-compliance

A failure to comply with the reforms, including a failure to file a dispute resolution statement, does not of itself prevent the commencement or affect the validity of proceedings, however, the court may take such failure into account when making costs orders in respect of pre-filing costs, or when making costs orders in relation to the proceedings as a whole.

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Tom has also had experience in the Mergers and Acquisitions and Finance teams, before settling in the Commercial Disputes division. Tom joined Minter Ellison in February 2009, following the completion of a Bachelor of Commerce degree, majoring in Accounting, from the University of Sydney and a Bachelor of Law degree from the University of Technology, Sydney.

Tom has recently undertaken a full time secondment at the Australian Centre for International Commercial Arbitration and the Australian International Disputes Centre and is continuing to assist the Centres on an on-going part time basis.

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Jane also has extensive administrative law experience, providing advice to the Medical Practitioners Board of Victoria and Professional Services Review and Medicare Australia in relation to the professional conduct of medical practitioners.