Examinable excerpts of

Civil Procedure Act 2010

as at 2 October 2019

CHAPTER 1—PRELIMINARY

1 Purposes

(1) The main purposes of this Act are—

(a) to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court, the County Court and the Magistrates' Court and provide for uniformity;

(b) to simplify the language relating to civil procedure;

(c) to 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;

(d) to amend various Acts in relation to the conduct of civil proceedings to reflect the new procedures.

(2) Without limiting subsection (1), this Act provides for—

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

(b) expanding the powers of the courts in relation to costs in relation to civil proceedings;

(c) the enhancement of case management powers of the courts, including in relation to discovery;

(d) further enhancement of appropriate dispute resolution processes;

(e) reform of the law relating to summary judgment;

(f) clarifying sanctions available to courts in relation to contravention of discovery obligations;

(g) the management and control of expert evidence in civil proceedings.

4 Application of this Act

(1) Subject to this section, this Act applies to all civil proceedings.

(2) This Act does not apply to proceedings under the following Acts—

(a) the **Family Violence Protection Act 2008**;

(b) the **Personal Safety Intervention Orders Act 2010**;

(c) the **Confiscation Act 1997**;

(d) the Proceeds of Crime Act 1987 of the Commonwealth and the Proceeds of Crime Act 2002 of the Commonwealth;

(e) the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**;

(ea) the **Criminal Organisations Control Act 2012**;

(f) the **Children, Youth and Families Act 2005**;

(g) the **Coroners Act 2008**;

(h) the **Victims of Crime Assistance Act 1996**;

(i) the **Sentencing Act 1991**;

(j) the **Serious Offenders Act 2018**.

(k) the **National Domestic Violence Order Scheme Act 2016**.

(3) This Act does not apply to any proceeding in VCAT.

Note

VCAT means the Tribunal under the **Victorian Civil and Administrative Tribunal Act 1998**.

(4) This Act does not apply to any proceeding under a prescribed Act.

6 Charter and privilege not overridden

Nothing in this Act is intended to override—

(a) the **Charter of Human Rights and Responsibilities Act 2006**; or

(b) the doctrine of privilege, whether arising by or under the common law, statute or otherwise.

CHAPTER 2—OVERARCHING PURPOSE AND OVERARCHING OBLIGATIONS

PART 2.1—OVERARCHING PURPOSE

7 Overarching purpose

(1) The overarching purpose of this 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.

(2) Without limiting how the overarching purpose is achieved, it may be achieved by—

(a) the determination of the proceeding by the court;

(b) agreement between the parties;

(c) any appropriate dispute resolution process—

(i) agreed to by the parties; or

(ii) ordered by the court.

8 Court to give effect to overarching purpose

(1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

(2) Subsection (1) applies despite any other Act (other than the **Charter of Human Rights and Responsibilities Act 2006**) or law to the contrary.

9 Court's powers to further the overarching purpose

(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) the just determination of the civil proceeding;

(b) the public interest in the early settlement of disputes by agreement between parties;

(c) the efficient conduct of the business of the court;

(d) the efficient use of judicial and administrative resources;

(e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—

(i) the fair and just determination of the real issues in dispute; and

(ii) the preparation of the case for trial;

(f) the timely determination of the civil proceeding;

(g) dealing with a civil proceeding in a manner proportionate to—

(i) the complexity or importance of the issues in dispute; and

(ii) the amount in dispute.

(2) For the purposes of subsection (1), the court may have regard to the following matters—

(a) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes;

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

(c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding;

(d) the degree to which any lack of promptness by a party in undertaking the proceeding has arisen from circumstances beyond the control of that party;

(e) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the proceeding;

(f) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court;

(g) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;

(h) the extent to which the parties have had the benefit of legal advice and representation.

(3) This section does not—

(a) limit any other power of a court to make orders or give directions; or

(b) preclude the court from considering any other matters when making any order or giving any direction.

PART 2.2—APPLICATION OF THE OVERARCHING OBLIGATIONS

10 Application of overarching obligations—participants

(1) The overarching obligations apply to—

(a) any person who is a party;

(b) any legal practitioner or other representative acting for or on behalf of a party;

(c) any law practice acting for or on behalf of a party;

(d) any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—

(i) an insurer;

(ii) a provider of funding or financial support, including any litigation funder.

(2) Subject to subsection (3), the overarching obligations do not apply to any witness in a civil proceeding.

(3) The overarching obligations (other than the overarching obligations specified in sections 18, 19, 22 and 26) apply to any expert witness in a civil proceeding.

(4) Subsection (3) is in addition to, and not in derogation of, any existing duties applying to expert witnesses.

11 Application of overarching obligations—civil proceedings

The overarching obligations apply in respect of the conduct of any aspect of a civil proceeding in a court, including, but not limited to—

(a) any interlocutory application or interlocutory proceeding;

(b) any appeal from an order or a judgment in a civil proceeding;

(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

12 Overarching obligations prevail over certain other obligations and duties

Subject to the paramount duty, the overarching obligations prevail over any legal obligation, contractual obligation or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.

13 Overarching obligations and legal practitioners

(1) The overarching obligations do not override any duty or obligation of a legal practitioner to a client, whether arising under the common law or by or under any statute or otherwise, to the extent that those duties and obligations and the overarching obligations can operate consistently.

(2) Despite subsection (1), a legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must comply with the overarching obligations despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.

(3) In the case of any inconsistency between any overarching obligation and a duty or obligation referred to in subsection (1) or an instruction or a wish referred to in subsection (2)—

(a) the overarching obligation prevails to the extent of that inconsistency; and

(b) in the case of the instruction or wish of a client, the legal practitioner is not required to comply with any instruction or wish of the client which is inconsistent with the overarching obligation.

14 Legal practitioner or law practice not to cause client to contravene overarching obligations

A legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must not by his, her or its conduct cause the client to contravene any overarching obligation.

15 Legal practitioner's duty to court not overridden

Nothing in this Part overrides any duty or obligation of a legal practitioner to the court, whether arising under the common law or by or under any statute or otherwise.

PART 2.3—THE OVERARCHING OBLIGATIONS

16 Paramount duty

Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—

(a) any interlocutory application or interlocutory proceeding;

(b) any appeal from an order or a judgment in a civil proceeding;

(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

17 Overarching obligation to act honestly

A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding.

18 Overarching obligation—requirement of proper basis

A person to whom the overarching obligations apply must not make any claim or make a response to any claim in a civil proceeding that—

(a) is frivolous; or

(b) is vexatious; or

(c) is an abuse of process; or

(d) does not, on the factual and legal material available to the person at the time of making the claim or responding to the claim, as the case requires, have a proper basis.

19 Overarching obligation to only take steps to resolve or determine dispute

For the purpose of avoiding undue delay and expense, a person to whom the overarching obligations apply must not take any step in connection with any claim or response to any claim in a civil proceeding unless the person reasonably believes that the step is necessary to facilitate the resolution or determination of the proceeding.

20 Overarching obligation to cooperate in the conduct of civil proceeding

A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.

21 Overarching obligation not to mislead or deceive

A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—

(a) misleading or deceptive; or

(b) likely to mislead or deceive.

22 Overarching obligation to use reasonable endeavours to resolve dispute

A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—

(a) it is not in the interests of justice to do so; or

(b) the dispute is of such a nature that only judicial determination is appropriate.

Example

A proceeding where a civil penalty is sought may be of such a nature that only judicial determination is appropriate.

23 Overarching obligation to narrow the issues in dispute

If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—

(a) resolve by agreement any issues in dispute which can be resolved in that way; and

(b) narrow the scope of the remaining issues in dispute—

unless—

(c) it is not in the interests of justice to do so; or

(d) the dispute is of such a nature that only judicial determination is appropriate.

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—

(a) the complexity or importance of the issues in dispute; and

(b) the amount in dispute.

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—

(a) act promptly; and

(b) minimise delay.

26 Overarching obligation to disclose existence of documents

(1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of 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.

(2) Disclosure under subsection (1) must occur at—

(a) the earliest reasonable time after the person becomes aware of the existence of the document; or

(b) such other time as a court may direct.

(3) Subsection (1) does not apply to any document which is protected from disclosure—

(a) on the grounds of privilege which has not been expressly or impliedly waived; or

(b) under any Act (including any Commonwealth Act) or other law.

(4) The overarching obligation imposed by this section—

(a) is an ongoing obligation for the duration of the civil proceeding; and

(b) does not limit or affect a party's obligations in relation to discovery.

27 Protection and use of information and documents disclosed under overarching obligation in section 26

(1) A person who receives any information or documents provided by another person involved in the civil proceeding as a result of disclosure in compliance with the overarching obligation in section 26 is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with the civil proceeding.

(2) The obligation under subsection (1) is taken to be an obligation to the court, contravention of which constitutes contempt of court.

(3) A person—

(a) may agree in writing to the use of information or documents otherwise protected under subsection (1); or

(b) may be released from the obligation imposed under subsection (1) by leave of the court.

(4) Without limiting this section or discovery in any civil proceeding any information or documents exchanged in compliance with the overarching obligation in section 26 is required to be discovered in the civil proceeding to be admissible in that proceeding.

(5) Nothing in this section limits any other undertaking to a court (implied or specific) whether at common law or otherwise, in relation to information or documents disclosed or discovered in a civil proceeding.

PART 2.4—SANCTIONS FOR CONTRAVENING THE OVERARCHING OBLIGATIONS

28 Court may take contravention of overarching obligations into account

(1) In exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligations.

(2) Without limiting subsection (1), in exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.

29 Court may make certain orders

(1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—

(a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;

(b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;

(c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—

(i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or

(ii) an order for no interest or reduced interest;

(d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;

(e) an order that the person not be permitted to take specified steps in the civil proceeding;

(f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.

(2) An order under this section may be made—

(a) on the application of—

(i) any party to the civil proceeding; or

(ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or

(b) on the court's own motion.

(3) This section does not limit any other power of a court to make any order, including any order as to costs.

30 Applications for orders under section 29

(1) An application for an order under section 29 is to be made—

(a) in the court in which the civil proceeding was, or is being, heard; and

(b) in accordance with the rules of court.

(2) An application for an order under section 29 must be made prior to the finalisation of the civil proceeding to which the application relates (excluding any period for appeals).

(3) For the purposes of subsection (2), if an order, including an order in respect of costs, is made after the date of finalisation of the civil proceeding to which the application relates, the date of making of the last of the orders is taken to be the date of finalisation of that proceeding.

31 Extension of time for application

(1) Despite section 30(2), a person may apply to the court for an extension of time to apply for an order under section 29 after the finalisation of the civil proceeding.

(2) The court may grant an extension of time for making an application under section 29 if satisfied that the person making the application was not aware of the contravention of the overarching obligations until after the end of the period specified in section 30(2).

(3) An application under this section may be made by—

(a) any party to the civil proceeding; or

(b) any other person who has a sufficient interest in the civil proceeding.

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CHAPTER 4—COMMENCEMENT AND CONDUCT OF CIVIL PROCEEDINGS

PART 4.1—CERTIFICATION REQUIREMENTS ON COMMENCEMENT OF CIVIL PROCEEDINGS

41 Overarching obligations certification by parties on commencement of civil proceeding

(1) Each party must personally certify that the party has read and understood the overarching obligations and the paramount duty.

(2) The overarching obligations certification must be—

(a) filed with the first substantive document in the civil proceeding filed by the party; and

(b) otherwise in accordance with the rules of court.

(3) Despite subsection (1), if a party is represented by a litigation guardian or similar representative, the litigation guardian or similar representative may make the overarching obligations certification.

(4) Despite subsection (1), if a party has no meaningful control over the conduct of a civil proceeding by virtue of a statute or a contract of insurance, the person in control by virtue of the statute or contract of insurance may make the overarching obligations certification.

Example

An insurer may make the certification instead of a party.

(5) Despite subsection (1), a party who is represented by a legal practitioner is not required to make the overarching obligations certification if—

(a) the party is currently involved, or has been involved, in more than one civil proceeding and has personally made the overarching obligations certification in other civil proceedings in the same jurisdiction within—

(i) a period specified by rules of court; or

(ii) if no period is specified by rules of court, 2 years prior to the current proceeding; and

(b) the legal practitioner of that party certifies, in accordance with the rules of court, as to the matters specified in paragraph (a).

42 Proper basis certification

(1) A legal practitioner acting for or on behalf of a party to the proceeding must file a proper basis certification which complies with this section in the following circumstances—

(a) on the filing of a party's first substantive document in a civil proceeding;

(b) on the filing of any subsequent substantive document in a civil proceeding which—

(i) adds or substitutes a party; or

(ii) makes, adds or substitutes a claim or cause of action; or

(iii) makes, adds or substitutes a substantive defence or substantive matter by way of response or reply; or

(iv) makes, adds or substitutes a material allegation denial or non-admission of fact or law; or

(v) makes any significant amendment to a first substantive document or a subsequent substantive document;

(c) as provided for by rules of court;

(d) as directed by the court in any civil proceeding.

(1A) In the case of a civil proceeding which involves allegations of fact, a legal practitioner making a proper basis certification must certify that on the factual and legal material available—

(a) each allegation of fact in the document has a proper basis;

(b) each denial in the document has a proper basis;

(c) there is a proper basis for each non-admission in the document.

(1B) In the case of a civil proceeding commenced by originating motion seeking a particular legal relief or remedy, a legal practitioner making a proper basis certification must certify, as the case requires, that on the factual and legal material available—

(a) the claim in the document, or a response to a claim in the document, has a proper basis; or

(b) the question posed by the party to the court in the document, or a response to a question posed, has a proper basis.

(1C) Despite subsections (1) to (1B), a legal practitioner is not required to make a proper basis certification if rules of court provide that a process or document is exempt from the proper basis certification requirement because it is administrative in nature.

Example

Registration of judgments.

(2) A proper basis certification must be in accordance with the rules of court.

(3) For the purposes of this section, a determination by a legal practitioner—

(a) as to whether any allegation or denial of fact has a proper basis, on the factual and legal material available, must be based on a reasonable belief as to the truth or untruth of the allegation or denial; or

(b) as to the proper basis of any non-admission is that the legal practitioner does not know, and therefore cannot say, whether a fact alleged or denial is true or untrue; or

(c) as to whether any claim, response to a claim, question posed or response to a question posed has a proper basis, on the factual and legal material available, must be based on a reasonable belief that the claim, response to a claim, question or response to a question has a proper basis.

(4) If a party is not represented by a legal practitioner—

(a) the proper basis certification must be completed personally by that party; and

(b) a reference in this section to "legal practitioner" is to be construed as a reference to that party.

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44 Urgent filing of documents and certification

(1) Despite the requirements of this Part, if as a matter of urgency a document is required to be filed in a civil proceeding, a party to the proceeding or a legal practitioner acting for or on behalf of a party to the proceeding may file the document without complying with the applicable certification provision of this Part.

Examples

A document needs to be filed to comply with a limitation period which is about to expire and it is not possible for a party to the proceeding to give certification before the time limit expires. Other examples include applications for freezing orders or for search orders and urgent interlocutory applications.

(2) If subsection (1) applies, the person must file the relevant certification in compliance with the relevant section as soon as practicable after filing the document.

45 Proceedings may be commenced or substantive documents filed despite failure to certify

Unless a court otherwise orders, a court may not prevent the commencement of civil proceedings in the court or the filing of any substantive document by a party to a civil proceeding merely because of a failure to comply with any certification requirement under this Part.

46 Court may take failure to comply into account

A court may take into account any failure by a person to comply with any certification requirement under this Part—

(a) in determining costs in the proceeding generally;

(b) in making any order about the procedural obligations of parties to the civil proceeding;

(c) in making any other order it considers appropriate.

PART 4.2—CASE MANAGEMENT

47 Judicial powers of case management—overarching purpose and active case management

(1) Without limiting any other power of a court, for the purposes of ensuring that a civil proceeding is managed and conducted in accordance with the overarching purpose, the court may give any direction or make any order it considers appropriate, including any directions given or orders made—

(a) in the interests of the administration of justice; or

(b) in the public interest.

(2) A direction given or an order made under subsection (1) may include, but is not limited to, imposing any reasonable limits, restrictions or conditions in respect of—

(a) the management and conduct of any aspect of a civil proceeding; or

(b) the conduct of any party.

(3) Without limiting subsection (1) or (2), a court may actively case manage civil proceedings by—

(a) giving directions to ensure that the civil proceeding is conducted promptly and efficiently;

(b) identifying at an early stage the issues involved in the civil proceeding, including any issues that have not been resolved in accordance with any mandatory or voluntary pre-litigation processes;

(c) deciding the order in which the issues in dispute in the civil proceeding are to be resolved including—

(i) deciding promptly which issues need full investigation and a hearing; and

(ii) disposing summarily of other issues;

(d) encouraging the parties—

(i) to co-operate with each other in the conduct of the civil proceedings;

(ii) to settle the whole or part of the civil proceedings;

(iii) to use appropriate dispute resolution;

(e) controlling the progress of the civil proceeding, including, but not limited to—

(i) fixing timetables;

(ii) dealing with as many aspects of a civil proceeding as it can on the same occasion;

(iii) dealing with the civil proceeding without the parties needing to attend court;

(iv) making use of technology;

(f) limiting the time for the hearing or any other part of a civil proceeding, including, but not limited to—

(i) limiting the number of witnesses at the hearing;

(ii) limiting the time for the examination or cross-examination of any witness;

(iii) limiting the issues or matters that may be the subject of examination or cross-examination;

(g) considering whether the likely benefits of taking a particular step in a civil proceeding justify the cost of taking it.

48 Court's power to order and direct pre-trial procedures

(1) In addition to any other power a court may have, a court may make any order or give any direction it considers appropriate to further the overarching purpose in relation to pre-trial procedures.

(2) Without limiting subsection (1), a court may give any directions or make any orders it considers appropriate with respect to—

(a) the conduct of proceedings;

(b) timetables or timelines for any matters to be dealt with, including—

(i) the conduct of any hearing; and

(ii) the time within which specified steps in a civil proceeding must be completed;

(c) the use of appropriate dispute resolution to assist in the conduct and resolution of all or part of the civil proceedings;

(d) the attendance of parties and legal practitioners at a case management conference with a judicial officer to consider the most cost effective and efficient means of bringing the civil proceeding to trial and of conducting the civil proceeding, including giving further directions;

(e) defining issues by pleadings or otherwise, including requiring parties or their legal practitioners to exchange memoranda, or take other steps to clarify questions;

(f) the attendance of parties or their practitioners before a judicial officer for a conference for the purposes of—

(i) satisfying the judicial officer that all reasonable steps to achieve resolution of the issues in dispute have been taken; or

(ii) otherwise clarifying the real issues in dispute to enable appropriate directions to be given for the further conduct of the dispute or civil proceeding; or

(iii) otherwise shortening the time taken in preparation for the trial and at the trial;

(g) any other matter specified in rules of court.

49 Court's power to order and direct trial procedures and conduct of hearing

(1) In addition to any other power a court may have, a court may give any direction or make any order it considers appropriate to further the overarching purpose in relation to the conduct of the hearing in a civil proceeding.

(2) A direction or an order under subsection (1) may be given or made by the court at any time—

(a) before a hearing commences; or

(b) during a hearing.

(3) Without limiting subsection (1), a court may give any direction or make any order it considers appropriate with respect to—

(a) the order in which evidence is to be given and addresses made;

(b) the order in which questions of fact are to be tried;

(c) limiting the time to be taken by a trial, including the time a party may take to present the party's case;

(d) witnesses, including—

(i) limiting the time to be taken in examining, cross-examining or re-examining witnesses;

(ii) not allowing cross-examination of particular witnesses;

(iii) limiting the number of witnesses that a party may call;

(e) limiting the issues or matters that may be the subject of examination or cross-examination;

(f) limiting the length or duration of written and oral submissions;

(g) limiting the numbers of documents to be prepared or that a party may tender in evidence;

(h) the preparation by the parties of an agreed bundle of documents for use in the proceeding or a schedule summarising business records or other documents;

(i) the place, time and mode of trial;

(j) evidence, including, but not limited to whether evidence in chief should be given orally, by affidavit or by witness statement;

(k) costs, including the proportions in which the parties are to bear any costs;

(l) any other matter specified in rules of court.

50 Statement of issues

(1) Without limiting any other power of a court under this Part, a court may order or direct that parties to a proceeding consult and prepare a statement of issues which identifies and summarises the key issues in dispute in the proceeding.

(2) The court may settle the contents of the statement of issues ordered or directed to be prepared under subsection (1) if the parties are unable to agree on the contents of the statement.

50A Use of statement of issues

(1) The court may use a statement of issues in a proceeding in any manner the court considers appropriate to further the overarching purpose in relation to the following—

(a) pre-trial procedures;

(b) the conduct of the proceeding at trial.

(2) Without limiting subsection (1), a statement of issues may be used for the purpose of discovery of documents.

(3) A statement of issues does not displace the function of any pleadings in the proceeding.

51 Contravention of orders or directions under this Part

If a person to whom a direction has been given or to whom an order made under this Part applies contravenes the direction or order, the court may do any one or more of the following—

(a) dismiss the civil proceeding, whether—

(i) generally; or

(ii) in relation to a particular cause of action; or

(iii) in relation to the whole or part of a particular claim;

(b) strike out or limit any claim made by a plaintiff;

(c) strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly;

(d) strike out or amend any document filed by the person, either in whole or in part;

(e) disallow or reject any evidence that the person has adduced or seeks to adduce;

(f) direct the person to pay the whole or part of the costs of another party or person;

(g) make any other order or give any other direction that the court considers appropriate.

52 Court may revoke or vary direction or order

A court may revoke or vary any direction or order made by it under this Part.

53 Interaction with other powers of court

(1) Nothing in this Part limits any other power a court may have—

(a) to take action of the kind referred to in this Part; or

(b) to take any other action that the court is empowered to take in relation to a contravention of a direction given or order made by the court.

(2) Nothing in this Part limits—

(a) in the case of the Supreme Court, the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

(b) in the case of a court other than the Supreme Court, the court's implied jurisdiction or statutory jurisdiction; or

(c) any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.

PART 4.3—DISCLOSURE AND DISCOVERY

54 Discovery of documents to be in accordance with rules of court

Unless a court otherwise orders, discovery of documents in a civil proceeding is to be in accordance with the rules of court.

55 Court orders for discovery

(1) A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.

(2) Without limiting subsection (1), a court may make any order or give any directions—

(a) requiring a party to make discovery to another party of—

(i) any documents within a class or classes specified in the order; or

(ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;

(b) relieving a party from the obligation to provide discovery;

(c) limiting the obligation of discovery to—

(i) a class or classes of documents specified in the order; or

(ii) documents relating to one or more specified facts or issues in dispute; or

(iii) some or all of the issues set out in a statement of issues filed in the proceeding;

(d) that discovery occur in separate stages;

(e) requiring discovery of specified classes of documents prior to the close of pleadings;

(f) expanding a party's obligation to provide discovery;

(g) requiring a list of documents be indexed or arranged in a particular way;

(h) requiring discovery or inspection of documents to be provided by a specific time;

(i) as to which parties are to be provided with inspection of documents by another party;

(j) relieving a party of the obligation to provide an affidavit of documents;

(k) modifying or regulating discovery of documents in any other way the court thinks fit.

(3) A court may make any order or give any directions requiring a party discovering documents to—

(a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;

(b) make available a person who is able to—

(i) explain the way the documents are arranged; and

(ii) help locate and identify particular documents or classes of documents.

(4) A court may order or direct a party to pay to another party an amount specified or determined by, or in accordance with, the order or direction in relation to the costs of discovery in any manner considered appropriate by the court, including, but not limited to, payment in advance of an amount to the other party for some or all of the estimated costs of discovery.

(5) Without limiting any other power of a court to make costs orders, a court may order or direct that costs payable under an order or a direction under subsection (4) are recoverable as costs in the proceeding.

55A Provision of all documents in party's possession to other party by consent

(1) Subject to subsection (2), if all parties to a proceeding consent, a court may order or direct a party to provide all documents in the party's possession or control which relate to the issues in the proceeding to any other party on the basis that privilege is not waived.

(2) The court may make an order or give a direction under subsection (1) if satisfied that—

(a) giving the receiving party access to the documents is not likely to give rise to any substantial prejudice to the party providing the documents; and

(b) the documents can be identified and located without unreasonable cost to the party providing the documents; and

(c) the documents are able to be identified by a general description or category.

(3) An order or direction under subsection (1) may—

(a) specify that the documents are to be provided—

(i) in a searchable electronic format, if practicable; or

(ii) in any other manner or format that the court considers appropriate; and

(b) include any other order or direction that the court thinks fit, including, but not limited to, any order or direction in relation to the maintenance of privilege claims.

(4) Subject to subsection (5), if an order is made or a direction is given under subsection (1), the party providing documents to which the order or direction applies, at that party's own expense, may exclude any

privileged documents prior to providing the documents to the other party in accordance with the order or direction.

(5) A party who excludes any privileged documents in accordance with subsection (4) must provide to the other party a list of the documents for which privilege is claimed which specifies the grounds on which privilege is claimed.

(6) An order or a direction under subsection (1) may apply to documents whether or not those documents are required to be discovered in accordance with any rules of court.

(7) Nothing in this section limits any other power of a court under this Part or the rules of court.

55B Affidavit of document management

(1) For the purpose of assisting a court to make any appropriate orders or directions in relation to discovery, the court may order or direct that a party provide to the court an affidavit of document management.

(2) An affidavit of document management may include the following—

(a) the volume, manner of arrangement or storage, type or location of discoverable documents;

(b) the party's processes of document management.

(3) An affidavit of document management is in addition to any affidavit of documents which may be required in any proceeding.

55C Order for oral examination

(1) A court may order that the deponent of an affidavit of document management be subject to oral examination in relation to the affidavit of document management.

(2) A court may order that an appropriate person (other than the deponent of an affidavit of document management) who is able to provide information in relation to the matters dealt with in the affidavit of document management be subject to oral examination in relation to those matters.

(3) An order under subsection (1) or (2) may—

(a) specify the time, place and manner of conducting the examination; and

(b) specify whether the oral examination is to be conducted by—

(i) the court; or

(ii) the court constituted by a judicial officer other than the judicial officer constituting the court that made the order; and

(c) specify who is to pay the costs of the oral examination in the first instance; and

(d) include any other orders or directions that the court considers appropriate.

(4) Nothing in this section limits section 57 or any other powers of a court in relation to oral examination.

56 Court may order sanctions

(1) A court may make any order or give any direction it considers appropriate if the court finds that there has been—

(a) a failure to comply with discovery obligations; or

(b) a failure to comply with any order or direction of the court in relation to discovery; or

(c) conduct intended to delay, frustrate or avoid discovery of discoverable documents.

(2) Without limiting subsection (1), a court may make an order or give directions—

(a) that proceedings for contempt of court be initiated;

(b) adjourning the civil proceeding, with costs of that adjournment to be borne by the person responsible for the need to adjourn the proceeding;

(c) in respect of costs in the civil proceeding, including indemnity cost orders against any party or a legal practitioner who is responsible for, or who aids and abets, any conduct referred to in subsection (1);

(d) preventing a party from taking any step in the civil proceeding;

(e) prohibiting or limiting the use of documents in evidence;

(f) in respect of facts taken as established for the purposes of the civil proceeding;

(g) awarding compensation for financial or other loss arising out of any conduct referred to in subsection (1);

(h) in respect of any adverse inference arising from any conduct referred to in subsection (1);

(i) compelling any person to give evidence in connection with any conduct referred to in subsection (1), including by way of affidavit;

(j) dismissing any part of the claim or defence of a party who is responsible for any conduct referred to in subsection (1);

(k) in relation to the referral to an appropriate disciplinary authority for disciplinary action to be taken against any legal practitioner who is responsible for, or who aids and abets, any conduct referred to in subsection (1).

57 Cross-examination regarding discovery obligations

Unless a court orders otherwise, any party to a civil proceeding may cross-examine or seek leave to conduct an oral examination of the deponent of an affidavit of documents prepared by or on behalf of any

other party to that proceeding if there is a reasonable basis for the belief that the other party may be—

(a) misinterpreting the party's discovery obligations; or

(b) failing to disclose discoverable documents.

58 Interaction with Evidence (Miscellaneous Provisions) Act 1958

Nothing in this Part derogates from the operation of Division 9 of Part III of the **Evidence (Miscellaneous Provisions) Act 1958**.

59 Interaction with rules of court

The powers of a court under this Part are in addition to, and do not derogate from, any powers a court has under rules of court in relation to discovery or disclosure of documents.

PART 4.4—SUMMARY JUDGMENT

60 References to defendant and plaintiff in this Part

In this Part, a reference—

(a) to a plaintiff includes a reference to a plaintiff by counterclaim; and

(b) to a defendant includes a reference to a defendant by counterclaim.

61 Plaintiff may apply for summary judgment in proceeding

A plaintiff in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a defendant's defence or part of that defence has no real prospect of success.

62 Defendant may apply for summary judgment in proceeding

A defendant in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a plaintiff's claim or part of that claim has no real prospect of success.

63 Summary judgment if no real prospect of success

(1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.

(2) A court may give summary judgment in any civil proceeding under subsection (1)—

(a) on the application of a plaintiff in a civil proceeding;

(b) on the application of a defendant in a civil proceeding;

(c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

64 Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—

(a) it is not in the interests of justice to do so; or

(b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

65 Interaction with rules of court

The powers of a court under this Part are in addition to, and do not derogate from, any powers a court has under rules of court in relation to summary disposal of any civil proceeding.

CHAPTER 5—APPROPRIATE DISPUTE RESOLUTION

66 Court may order proceeding to appropriate dispute resolution

(1) A court may make an order referring a civil proceeding, or part of a civil proceeding, to appropriate dispute resolution.

(2) Subject to any rules of court, an order under subsection (1) may be made without the consent of the parties if the type of appropriate dispute resolution to which the civil proceeding or part of the civil proceeding is referred is not—

(a) arbitration; or

(b) reference to a special referee; or

(c) expert determination; or

(d) any other type of appropriate dispute resolution which results, directly or indirectly, in a binding outcome.

(3) An order under subsection (1) may be made at any stage in the proceeding.

67 Evidence of things said and done in appropriate dispute resolution which is judicial resolution conference

If a court orders that a judicial resolution conference be conducted in relation to a civil proceeding, no evidence shall be admitted at the hearing of any proceeding of anything said or done by any person in the course of the conduct of the judicial resolution conference unless the court otherwise orders, having regard to the interests of justice and fairness.

68 Protection of conduct of judicial resolution conference

(1) Without limiting any other law, whether written or unwritten, a judicial officer performing duties in connection with any judicial resolution

conference has the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.

(2) Without limiting section 16 of the **Evidence Act 2008**, a judicial officer is not compellable to give evidence in any proceeding, whether civil or criminal, of anything said or done or arising from the conduct of a judicial resolution conference.

Note

See also sections 24A and 27A of the **Supreme Court Act 1986**, sections 47B and 48C of the **County Court Act 1958** and sections 108 and 108A of the **Magistrates' Court Act 1989**.

69 Interaction with other Acts and rules of court

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 (including any Commonwealth Act) or the rules of court in relation to appropriate dispute resolution.