

# Insurance Update

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## New Civil Procedure Act: Promoting Early Resolution

by Nieva Connell, Partner

Victoria has a new *Civil Procedure Act* ("the Act") which will come into operation on either 1 June 2011 or an earlier date (possibly 1 January 2011) if the Government decides that it should start earlier. The Act is 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.

The Act has important practical ramifications for insurers, lawyers and others for civil claims in Victoria both before proceedings are issued and after, as listed in the table below. For example, the Court may scrutinise and criticise parties if they cause delay through the late disclosure of their case and/or provision of documents.

This is the first time, in Victoria, that pre-litigation steps in civil claims have been legislated. However similar provisions exist in the *NSW Civil Procedure Act* and many of the steps to be adopted in Victoria are already operating in NSW.

### Important terms in the Act:

**Civil Dispute** – means a dispute which may result in the commencement of a civil proceeding.

**Civil Proceeding** – means any proceeding in a court other than a criminal proceeding or quasicriminal proceeding.

**Critical Documents** – means 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.

**Overarching Purpose** – The Act defines an overarching purpose of the legislation. The Courts must have regard to the overarching purpose when making orders and giving directions in a civil proceeding

(s.7). The Act sets out a list of objectives that include:

- (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;
- (f) The timely determination of the civil proceeding;
- (g) Dealing with a civil proceeding in a manner proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

**Overarching Obligations** – The Act also sets out "overarching obligations". Overarching obligations apply to insurers, insureds, lawyers and certain others (s.10). A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding (s.17). Therefore, the overarching obligations do not apply to civil disputes (pre-litigation).

The Act imposes a series of obligations including:

- (a) Overarching obligation to act honestly;
- (b) Overarching obligation to not make any claim or make a response to any claim in a civil proceeding that is frivolous, vexatious or an abuse of process, or which the person does not have a proper basis to make;
- (c) Overarching obligation to avoid undue delay and expense, by not taking 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.

- (d) Overarching obligation to cooperate in the conduct of civil proceeding
- (e) Overarching obligation not to mislead or deceive
- (f) Overarching obligation to use reasonable endeavours to resolve dispute
- (g) Overarching obligation to narrow the issues in dispute
- (h) Overarching obligation to ensure costs are reasonable and proportionate
- (i) Overarching obligation to minimise delay
- (j) Overarching obligation to disclose existence of critical documents

Importantly, lawyers must comply with the overarching obligations despite any obligation the lawyer has to act in accordance with the instructions or wishes of their client (s.13(2)).

**Paramount Duty** – Each person to whom the overarching obligations apply (including insurers) 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.

Historically, only lawyers have owed such a duty to the court.

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# Civil Disputes – Pre-litigation

## What do I have to do?

- Take reasonable steps to resolve the dispute or narrow the issues.
- Exchange critical documents and information.
- Not unreasonably refuse to participate in negotiations or dispute resolution.
- Keep critical documents and information confidential.

The overarching obligations and paramount duty do not apply at this stage, instead, the “Chapter 3” obligations apply.

Under Chapter 3 of the Act, each person involved in a civil dispute must take reasonable steps, having regard to the person’s situation and the nature of the dispute –

- (a) To resolve the dispute by agreement; or
- (b) To clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

What are “reasonable steps”?

Reasonable steps include, but are not limited to –

- (a) The exchange of appropriate pre-litigation correspondence, information and critical documents;
- (b) The consideration of 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 or appropriate dispute resolution.

Each person involved in a civil dispute must not unreasonably refuse to participate in genuine and reasonable negotiations or appropriate dispute resolution.

Each person involved in a civil dispute who receives documents or information provided by another person involved in the civil dispute in accordance with the pre-litigation requirements must not use the documents or information for any purpose other than the civil dispute or any related civil proceeding.

## When do I have to do it?

- As soon as possible, and no later than 1 June 2011.

The commencement of the pre-litigation requirements is somewhat convoluted. Section 33 provides that the pre-litigation requirements must be complied with prior to the commencement of any civil proceedings, where the civil proceedings are commenced on or after 6 months after the commencement of Part 3.1 of the Act. Assuming that Part 3.1 of the Act commences on 1 June 2011, the pre-litigation requirements will have to be complied with in relation to civil disputes, where civil proceedings arise from the civil dispute and those civil proceedings are commenced on or after 1 December 2011. It will be virtually impossible to determine whether civil proceedings will be commenced on or after 1 December 2011, accordingly, it is good practice to start complying with the pre-litigation requirements as soon as possible, and certainly no later than 1 June 2011. This is further complicated by the fact that the Act may commence earlier than 1 June 2011, which may bring the date for compliance forward.

The pre-litigation provisions apply to all civil disputes, except appeals, proceedings involving civil penalties, proceedings under the Charter of *Human Rights and Responsibilities Act 2006 (Vic)*, a dispute which has been conducted in according with a pre-litigation process for claims under the *Transport Accident Act 1986 (Vic)* or the *Accident Compensation Act 1985 (Vic)*, civil disputes under the *Corporations Act* or *ASIC Act*, or disputes involving vexatious litigations. The Parliament may, at a later time, exempt certain classes of proceedings.

## What if I don’t do it?

- Insurer could be held in contempt of Court.
- Costs penalties may apply.

The obligation in relation to keeping documents and information confidential is an obligation to the court, contravention of which constitutes contempt of court (s.35). Generally, it is not intended that employees of insurers will be personally liable for breach of an obligation, instead, the insurer company will be found to be liable.

If a court is satisfied that a party to a civil proceeding has failed to comply with the pre-litigation requirements, the court may take into account that failure –

- (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.

## Civil Disputes – Pre-litigation (cont)

<b>What if the other side doesn't do it?</b> <ul style="list-style-type: none"><li>• Litigation can still be commenced.</li></ul>	Unless a court otherwise orders or rules of court otherwise provide, a court may not prevent the commencement of civil proceedings in the court merely because of noncompliance with the pre-litigation requirements.
<b>Who pays for it?</b> <ul style="list-style-type: none"><li>• Generally, each party bears its own costs. However, the Court can make costs orders.</li></ul>	<p>Each person involved in a civil dispute is to bear that person's or party's own costs of compliance with the pre-litigation requirements, unless the rules of court otherwise provide.</p> <p>The Court has the power to order a party to a civil proceeding (or their "representative", which may include an insurer) pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to furthering the overarching purpose.</p>

## Civil Proceedings – Litigation

<b>What do I have to do?</b> <ul style="list-style-type: none"><li>• Comply with the overarching obligations and paramount duty.</li><li>• Disclose the existence of critical documents.</li><li>• Parties have to certify they have understood the overarching obligations and paramount duty.</li><li>• Parties have to certify each allegation and denial has a proper basis.</li><li>• Parties must certify that the pre-litigation requirements have been complied with.</li></ul>	<p>Comply with the overarching obligations from the time the first substantive document is served (usually a statement of claim).</p> <p>Comply with the paramount duty from the time the first substantive document is served.</p> <p>Each person to whom the overarching obligations apply (including insurers), must disclose to each party the existence of all critical documents (except privileged documents). This obligation is in addition to the discovery obligation.</p> <p>This disclosure must occur at the earliest reasonable time after the person becomes aware of the existence of the document, or such other time as a court may direct. This obligation is in addition to the normal duty of discovery.</p> <p>At the time the first substantive document in the civil proceeding is filed by a party, each party must personally certify that the party has read and understood the overarching obligations and the paramount duty (s.41). Generally, it will be the lawyers who provide this certification.</p> <p>At the time the first substantive document in the civil proceeding is filed by a party (and on each significant amendment to the first substantive document), the party's lawyers must certify that the each allegation, denial and non-admission has a proper basis (if there are no lawyers acting, the party themselves must provide the certification) (s.42). This certification must be based on a reasonable belief as to the truth or untruth of the allegation, denial or non-admission.</p> <p>Each party to a civil dispute under Chapter 3 which results in civil proceedings, must certify whether the pre-litigation requirements have been complied with, and if they haven't, must set out the reasons why (s.43).</p> <p>In urgent cases, it is possible for documents to be filed without providing the applicable certification. In those cases, the relevant certification must be provided as soon as practicable after filing the document (s.44).</p> <p>Lawyers may be ordered (at any time) to prepare a memorandum setting out, among other things, the estimated costs and disbursements in relation to a trial, and then provide that memorandum to the Court and/or a party to the civil proceeding (including, presumably, the lawyer's own client/the insured) (s.50).</p>
<b>When do I have to do it?</b> <ul style="list-style-type: none"><li>• From 1 June 2011 (or possibly earlier).</li></ul>	<p>From 1 June 2011, unless the Government proclaims an earlier date, which is possible.</p> <p>We note that the requirements in relation to overarching obligations and paramount duty apply from the date the Act commences, even if the proceedings were commenced prior to that date – that is, they apply to existing proceedings.</p>

## Civil Proceedings – Litigation (cont)

<p><b>What if I don't do it?</b></p> <ul style="list-style-type: none"><li>• Insurer could be held in contempt of Court.</li><li>• The Court has extensive powers to impose penalties.</li></ul>	<p>The overarching obligation in relation to keeping documents and information confidential is an obligation to the court, contravention of which constitutes contempt of court (s.27). Generally, it is not intended that employees of insurers will be personally liable for breach of an overarching obligation, instead, the insurer company will be found to be liable.</p> <p>If a court is satisfied that a party to a civil proceeding has failed to comply with the certification requirements, the court may take into account that failure –</p> <ul style="list-style-type: none"><li>(c) In determining costs in the proceeding generally;</li><li>(d) In making any order about the procedural obligations of parties to the civil proceeding;</li><li>(e) In making any other order it considers appropriate (s.46).</li></ul> <p>If a defendant to whom a direction has been given or to whom an order applies contravenes the direction or order, the Court has extensive powers, including the power to strike out or limit any defence or part of a defence filed by a defendant, and give judgment accordingly, and, disallow or reject any evidence that the defendant has adduced or seeks to adduce (s.51).</p>
<p><b>What if the other side doesn't do it?</b></p> <ul style="list-style-type: none"><li>• The Court has extensive powers to impose penalties.</li><li>• Proceedings can still be commenced.</li></ul>	<p>Unless a court otherwise orders or rules of court otherwise provide, a court may not prevent the commencement of civil proceedings in the court merely because of noncompliance with the certification requirements (s.45).</p> <p>If a plaintiff to whom a direction has been given or to whom an order applies contravenes the direction or order, the Court has extensive powers, including the power to dismiss the civil proceeding, strike out or limit any statement of claim, and, disallow or reject any evidence that the plaintiff has adduced or seeks to adduce (s.51).</p>
<p><b>What else do I need to know?</b></p> <ul style="list-style-type: none"><li>• The Courts have extensive powers.</li><li>• Lawyers must comply.</li></ul>	<p>The Courts are given power to “ensure a civil proceeding is managed and conducted in accordance with the overarching purpose”, by making pre-trial directions and orders, including by ordering the parties to attend before a judicial officer to satisfying the judicial officer that all reasonable steps to achieve resolution of the issues in dispute have been taken.</p> <p>Lawyers must comply with the overarching obligations despite any obligation the lawyer has to act in accordance with the instructions or wishes of the client.</p>
<p><b>Who pays for it?</b></p> <ul style="list-style-type: none"><li>• Costs in the proceeding.</li></ul>	<p>Although the Act is silent on the issue, it appears that the costs of compliance with the certification requirements and other litigation requirements will be costs in the proceeding.</p>

We will provide you with a further update when the commencement date of the Act is known.

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