Chapter 3

Improving the Standards of Conduct of Participants in Civil Litigation
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Recommendations
The success of the Woolf reforms owed much to the success of the cultural shifts made by the judiciary and the legal profession. For example, barristers and solicitors had to learn that it is no longer acceptable to expect to use civil processes to gain tactical advantages in litigation. This type of change represented a fundamental shift in deeply ingrained mindsets. We suggest that a similar willingness to make radical changes to philosophies and practices will also be required to successfully embed Victorian reform efforts.1

1. Introduction and Summary

In response to concerns about costs and delays in recent years, provisions have been introduced in a number of jurisdictions into statutes and rules of court to impose certain obligations on courts in the conduct of civil litigation. In some instances obligations have also been imposed on litigants and lawyers to assist the court in achieving the overriding objectives.

Although the commission considers that these are important initiatives, which we have in large measure drawn on, we have concluded that the primary focus should be on the participants in civil litigation: the parties, their lawyers and others who exercise commercial or other influence or control over the conduct of proceedings.

This chapter outlines the commission’s proposal to create a new set of statutory provisions to define the overriding obligations and duties (the ‘overriding obligations’) to be imposed on all key participants in civil proceedings before Victorian courts, and to more clearly define the ‘overriding purpose’ sought to be achieved by the courts in civil proceedings. The introduction of these provisions aims to address one of the key policy objectives of this review, improving the standards of conduct of participants in the civil justice system to facilitate early dispute resolution, to narrow the issues in dispute and to reduce costs and delay.

1.1 Overriding Obligations Imposed on Participants

The commission’s recommendations encompass various legal obligations and duties to regulate the manner in which civil proceedings are conducted in the Magistrates’ Court, the County Court, the Supreme Court and the Court of Appeal. It is proposed that these obligations would be imposed on key participants in the Victorian civil justice system.

The overriding obligations and duties (the ‘overriding obligations’) would apply to the following participants:

- the parties to a civil proceeding
- the lawyers or any other representatives acting on behalf of the parties
- any law practice acting on behalf of a party to a civil proceeding
- any person, including insurers or providers of funding or financial support, providing any financial or other assistance to any party to a civil proceeding, insofar as such person exercises any direct or indirect control or influence over the conduct of a party.

The obligations would not apply to witnesses as to fact but a number of the obligations would apply to expert witnesses.2

It is proposed that these overriding obligations be imposed by statute and have priority over other obligations and duties which the participants may have, including any legal, ethical or contractual obligations. In particular, the legislation should provide that the obligations are to apply despite any obligation that a lawyer or law practice may have to act in accordance with the wishes or instructions of a client.3

The aim of the proposal is to create a uniform ‘model standard’ for the conduct of key participants in the civil justice system. The provision would restate and clarify existing obligations and duties and impose new obligations and duties, with a view to improving standards of conduct within the civil justice system.

This proposal is a response to persistent concerns about the conduct of various participants in the civil justice system. It is also an attempt to provide an approach which is consistent across the system. To date, in Victoria and in other jurisdictions, various piecemeal measures have been introduced to address problems in particular areas.

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1 Submission CP 62 (Victorian Bar).
2 The commission originally envisaged that the provisions would also apply to any person who is a witness or potential witness, including an expert witness, who has knowledge or documents relevant to any aspect of a civil proceeding. This position had some support in a number of submissions and consultations (for example, Submission ED 1 7 (Judge Wodak) and in consultation with several judges of the Supreme Court (2 August 2007). However, following further consideration it was resolved that in fact witnesses should be excluded and that only some of the obligations were appropriate for imposition on expert witnesses. Thus, the common law immunity that witnesses presently enjoy is largely preserved. See Submission ED 1 24 (Victorian Bar), which makes reference to Cabassi v Villa (1940) 64 CLR 130, 141. There is a more detailed discussion of witnesses below.
3 Section 345(3) of the Legal Profession Act 2004 (NSW) is similar.
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This approach adopted by the commission is not entirely new. It is an extension of a trend of civil justice reforms in Australia and other common law jurisdictions, which are discussed below. Many of these reforms seek to change the ‘adversarial’ culture, in particular by emphasising ‘cooperation, candour and respect for truth’.

However, many of these reforms have been limited in scope. Some are applicable only to certain categories of litigation; others only encompass particular participants in the litigation process.

The proposed overriding obligations are confined to conduct in relation to civil proceedings before a Victorian court. This includes the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding and any appeal from any order or judgment in a civil proceeding. The provisions also apply to any dispute resolution processes which are ancillary to court proceedings, including negotiation and mediation. The commission is of the view that the same high standards of conduct should govern both the formal conduct of litigation and the informal processes of dispute resolution conducted by those who are parties to court proceedings.

The commission considered whether the provisions should also apply to civil disputes prior to the commencement of legal proceedings. It was decided that the obligations should apply only from the point of commencement of civil proceedings. Prior to the commencement of proceedings the conduct of parties in dispute, where there is a prospect of litigation, is dealt with by the commission’s recommendations in relation to pre-action protocols, which are discussed in Chapter 2.

The overriding obligations are a set of positive obligations and duties. These commence with a statement of a paramount duty to the court to further the administration of justice, and then set out 10 more specific obligations and duties.

Each of the persons to whom the overriding obligations are applicable:

- shall at all times act honestly
- shall refrain from making or responding to any claim in the proceeding, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or does not have merit
- shall not take any step in the proceeding unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
- has a duty to cooperate with the parties and the court in connection with the conduct of the proceeding
- shall not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive or knowingly aid, abet or induce such conduct
- shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution (ADR) processes
- where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
- shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- shall use reasonable endeavours to act promptly and to minimise delay
- has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.

While the paramount duty is owed by the participants to the court some of the specific duties are owed by the participants to each other.

In addition to the overriding obligations various certification provisions are proposed in relation to both parties and legal practitioners.
Parties would be required to personally certify that they have read and understood the overriding obligations. In addition, when filing any pleading they would be required to certify, or verify by affidavit or statutory declaration, that they believe that any allegation of fact made by them has merit, that any allegation of fact which is denied by them does not have merit and that where they do not admit any allegation of fact that after reasonable inquiry they do not know whether such allegation has merit. A determination by a party as to the merit of any allegation must be based on a reasonable belief as to the truth of the allegation.

In the case of legal practitioners, certification is required when filing any statement of claim or other originating process, defence or further pleading. It is required for any allegation or denial. In the case of nonadmissions, certification is required that there is an inability to determine the merit of the allegation. The determination of merit by lawyers is required to be based on the available factual material and evidence, and a reasonable view of the law.

The primary objective of the overriding obligations is to bring about improvements in practices and the conduct of participants in the civil justice system, rather than to punish misconduct. However, in order to ensure compliance, the commission proposes that there should be a broad range of sanctions and remedies available to the court to deal with noncomplying behaviour. Some of these are compensatory as well as punitive. They include payment of legal costs, expenses or compensation, requiring that steps be taken to remedy the breach and precluding a party from taking certain steps in the proceeding.

The penalty and other provisions may be invoked on application by any party or person with sufficient interest or by the court of its own motion. However, because of the commission’s concern about the undesirability of ‘satellite’ litigation in respect of sanctions and remedies for alleged breaches of the overriding obligations, it is proposed that applications by a party or person with sufficient interest would require leave of the court.

In order to ensure that relevant participants become familiar with the applicable overriding obligations before the sanctions and other remedies come into force, the commission has recommended that the provisions relating to penalties for breach of the overriding obligations not come into effect until 12 months after the date of implementation of the overriding obligations provisions. Moreover, it is proposed that such penalties would only apply to breaches arising after that date. However, this delayed implementation would not prevent the courts from exercising any powers they already have, including in relation to costs.

Where leave is granted and an application for sanctions or other remedies is to be determined the commission is of the view that it is preferable for such application to be determined in the court in which the primary proceeding is heard. Where practicable, and without limiting the discretion of the court to decide how and by whom such application should be determined, the commission is of the view that the application should be dealt with initially by the judicial officer who is most familiar with the proceedings which gave rise to the application. This would reduce costs and avoid the necessity for another judicial officer to become familiar with the facts giving rise to the application.

In the interests of finality it is proposed that any application for sanctions or other remedies should normally be made not later than 28 days from the date of determination of the proceeding. However, the commission is mindful that in some situations a party or other interested person may not become aware of relevant facts within this time period and that there may need to be provision for extensions of time for the making of applications.

There may also need to be specific provisions dealing with how the obligations and sanctions would apply to corporations and law firms. In general, it is not the commission’s intention to render employees of parties or other participants personally liable for breach of the overriding obligations. In the case of corporations, it is intended that the corporation should be liable for the acts of any director, servant or agent acting within the scope of their actual or apparent authority. In the case of a law firm acting for a party, both the law firm and the individual lawyer(s) who breach the overriding obligations should be liable, but nonlegally qualified employees should not be personally liable for any breach.

Where penalty or other proceedings for breach have been instituted there may be circumstances where, for the purpose of defending such proceedings, a lawyer may seek to rely on information or advice which is subject to legal professional privilege. In particular, this may be the case where it is alleged that the proceedings in issue were without merit. In this context we note that the Migration
Act 1958 (Cth) provides for a limited statutory waiver of legal professional privilege in proceedings to determine whether a costs or other order should be made in respect of migration litigation which was commenced or continued without any reasonable prospect of success. 10

The draft overriding obligation provisions (including penalty provisions) and the draft certification provisions are set out in the final section of this chapter. The additional provisions relating to the overriding purpose and duties of the court are discussed below.

1.2 OVERRIDING PURPOSE AND DUTIES OF THE COURT

At present there are various provisions which seek to define the purpose and duties of Victorian courts in civil matters. These are discussed below. The commission proposes that there should be a uniform statement of ‘overriding purpose and duties’ applicable to all Victorian civil courts.

Following other models discussed in this chapter, the commission proposes that legislation should provide that the overriding purpose of the relevant legislation and the rules of court is to facilitate the ‘just, efficient, timely and cost effective resolution of the real issues in dispute’. This would apply not only to the determination of proceedings by the court but also to the alternative dispute resolution processes agreed to by the parties or ordered by the court.

The commission’s proposals would require the courts to seek to give effect to such overriding purpose when interpreting or exercising any powers in connection with civil disputes, whether derived from procedural rules or as part of the courts’ inherent, implied or statutory jurisdiction. Parties and legal practitioners or others acting on behalf of parties would be required to assist the court to further the overriding purpose (in addition to being subject to the overriding obligations directly applicable to such persons).

In addition to this general overriding purpose the commission’s recommendations encompass specific subsidiary objects which the courts would be required to consider in making any order or giving any direction. These are:

- the just determination of the proceeding
- the public interest in settlement of disputes
- the efficient disposal of court business
- the efficient use of resources
- the timely disposition of proceedings
- dealing with cases in ways proportionate to the amount involved, the importance and complexity of the issues and the financial position of the parties.

In addition to these matters, the court may have regard to other matters considered relevant, including:

- compliance by parties with pre-action procedural obligations or protocols
- the extent to which the parties have used reasonable endeavours to resolve the dispute
- the degree of expedition with which the parties have approached the proceeding
- the extent of compliance with the overriding obligations
- the degree of injustice that may be suffered by a party as a consequence of any order or direction.

Finally, the courts would be required to have regard to the objective of minimising delay between the commencement of cases and listing for trial.

2. RATIONALE FOR THE RECOMMENDATIONS

Regardless of the rights and responsibilities of parties, lawyers and financial entities outside the context of civil litigation, by invoking the processes of the courts, litigants subject others to compulsory processes and expense, deploy publicly funded court facilities and judicial and other court resources and have an impact on the capacity of the legal system to deal with other cases.

Accordingly, it is the commission’s view that high standards of conduct are required on the part of all participants in the civil litigation process and are in the best interests of the parties to disputes.
To date, various governments and government instrumentalities have adopted ‘model litigant’ guidelines in respect of their own conduct in litigation. Such model provisions do not apply to the other parties to the litigation. Statutory and other provisions applicable to certain types of litigation are limited in scope. The commission’s proposal extends these concepts to all litigants, lawyers and others involved in the civil litigation process, specifies the particular duties and obligations required to be complied with and provides for sanctions and other remedies for noncompliance. It thus provides a uniform and comprehensive set of standards and sanctions applicable to all participants in all litigation before all Victorian courts.

Anecdotally, there are persistent complaints about conduct issues, concerning not only lawyers but also other participants in the civil justice system, including the parties themselves. These complaints relate to:

- adversarial conduct which may exacerbate the dispute and contribute to the partisan attitudes and practices of lawyers, the parties and witnesses, particularly expert witnesses
- a lack of cooperation and disclosure, particularly at an early stage of proceedings
- the use of procedural tactics, including to delay proceedings, where it is perceived to be in a litigant’s interest
- incurring unnecessary or disproportionate legal and other costs.

Even where model litigant guidelines are in place to regulate the conduct of government parties or instrumentalities, allegations of inappropriate behaviour such as a ‘win-at-all-costs’ approach to litigation, continue.11

In Managing Justice, the Australian Law Reform Commission (ALRC) catalogued the following criticisms levelled at lawyers in submissions to that reference:

- fostering or encouraging litigation for financial benefit;
- abandoning clients when the money runs out;
- pressuring a client to accept a result that does not meet the client’s needs or desires;
- failing to act on the client’s instructions;
- competitive strategies to win the case at the expense of efficacy and equity;
- frustrating the client and the legal process by conduct designed to maintain conflict;
- lack of understanding or sympathy for the client’s specific situation;
- failure to inform the client about the progress or status of the case;
- abuse of subpoenas;
- controlling, obstructing or discouraging communication between disputants;
- delays in correspondence;
- lacking relevant knowledge of issues or facts;
- ignorance of ADR processes.12

Several submissions to this present inquiry raised conduct-related issues. In light of the difficulties faced in litigation, one submission suggested that in cases where the parties to litigation have vastly different means, a panel of retired senior counsel or judges should be available to examine each party’s rights and obligations. Where one party’s case is clearly stronger, it was proposed that the panel should refer the matter to a mediation in which the mediator is given ‘enhanced powers to force a settlement’.13 Another submission focused on negative conduct associated with the adversarial system, such as overly confrontational behaviour, suppression of relevant evidence and the costs and delays that such behaviour can lead to.14 Overall, however, there were relatively few complaints about the conduct of the legal profession but a multitude of suggestions about reforms needed. Conduct of participants other than lawyers, such as insurers and litigation funders, was identified as an area that should attract regulation given that ‘they have a greater capacity than most to systematically assist or retard the Court in achieving its Overriding Purpose’.15

The rationale for the commission’s recommendations in relation to overriding obligations does not arise out of any serious concern about widespread ‘improper’ conduct on the part of the Victorian legal profession. In part, the proposals arise out of the view that what has been traditionally regarded

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10  See Migration Act 1958 (Cth) s 486H.
13  CP 1 (Confidential Submission, permission to quote granted 17 January 2008).
14  CP 5 (Confidential Submission, permission to quote granted 4 February 2008). See also Submission CP 57 (IMF Australia), and Submission ED1 7 (Judge Wodak), who suggested that ‘[c]ontrols of the use of litigation tactics and procedures must be and remain in the hands of judicial officers’.
15  Submission CP 57 (IMF Australia).
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as ‘proper’ or normal professional conduct, and in particular the adversarial approach to litigation and the primacy often given to the partisan interests of clients, has not always been conducive to the quick, efficient or economical resolution of disputes.

In making its recommendations the commission is also mindful of recent expressions of concern at what some have described as the increasing trend towards ‘commercialisation’ of the practice of law. Such expressions of concern have emanated from the judiciary,16 regulators17 and from within the profession itself.18 Aspects of this trend are the move towards the incorporation of legal practices, the commercial alliance between legal practices and other commercial entities and, more recently, the public listing of law firms on the stock exchange. These developments, coupled with the deregulation of legal fees and the pervasive use of time-based charging practices, may tend to exacerbate ongoing tensions between professional duties and commercial desires. On the one hand, lawyers have professional obligations, including their duty to the court. On the other hand, law firms seek to be responsive to the demands of clients and the desire to maximise profitability. However these tensions are sought to be resolved outside the court system, the commission is of the view that those who seek to utilise publicly funded courts and judicial officers for the purpose of resolving disputes should be required to adhere to high standards of forensic conduct.

It is of interest to note that the perceived conflict between economic and ethical obligations arising out of the incorporation of legal practices in various jurisdictions in Australia has been resolved by the introduction of statutory overriding provisions. As Steve Mark has noted, in 2001 in New South Wales in the drafting of the legislation permitting incorporation, it was expressly provided in section 47S of the Legal Profession Act 1987 (NSW) that where there is an inconsistency between the Corporations Act 2001 (Cth) and the Legal Profession Act 1987 (NSW), the latter legislation prevails to the extent of the inconsistency. As Mark proceeds to note, the Legal Profession Act 2004 (NSW) attempted to incorporate the same concept through the provision in section 163 that Corporations Act displacement provisions are to be established by the Legal Profession Regulation 2005 (NSW).19

In Victoria a similar approach has been adopted in the Legal Profession Act 2004. Regulations made under the Act may declare any matter relating to an incorporated legal practice that is prohibited, required, authorised or permitted by the Act or regulations to be an ‘excluded matter’ for the purposes of section 5F of the Corporations Act 2001 (Cth). Moreover, the provisions of the Legal Profession Act 2004 or the regulations that apply to an incorporated legal practice (that is not a company within the meaning of the Corporations Act) prevail, to the extent of any inconsistency, over the provisions of the legislation by which the corporation is established or regulated.20

In the recent public listing of the law firm Slater & Gordon, the prospectus noted that:

The constitution states that where an inconsistency or conflict arises between the duties of the company (and the duties of lawyers employed by the company) the company’s duties to the court will prevail over all the duties and the company’s duty to its clients will prevail over the duty to shareholders.

Thus, through various means, the above provisions seek to implement a form of overriding obligations to deal with the potential conflict between ‘commercial’ obligations to shareholders and ‘professional’ obligations to clients and the court.

The commission’s recommendations in relation to overriding obligations:

- specify high standards of conduct in the civil justice system
- restate what is already accepted, on the part of the legal profession, as a paramount duty to the court and to the administration of justice
- seek to guide, improve and regulate the conduct of all key participants in the system
- will assist in facilitating further transformation of the culture in the system.

The force of the obligations will be enhanced by incorporating them in statute and providing for enforcement mechanisms and sanctions.

This approach is not entirely new. It is an extension of the trend of civil justice reforms in Australia and other common law jurisdictions. Many of these reforms have been directed to ameliorating the adversarial culture, in particular by emphasising ‘cooperation, candour and respect for truth’.22 A number of such reforms are also intended to achieve a more level litigious playing field where there are asymmetries of resources, power and expertise between parties to litigation.23
In some cases, the strategy has been to articulate key aims, objectives and principles for the operation of the civil justice system and the courts, often in statute or court rules. Such statements have been extended to impose obligations on the parties and the lawyers to assist in furthering certain aspirations. This strategy is discussed further below.

There are also more diverse and ad hoc examples in Victoria and elsewhere in Australia of measures aimed at modifying the conduct of participants in the civil justice system, including litigants and lawyers, through such mechanisms as statutes, practice rules, rules of court, guidelines, etc. A number of these are referred to in this chapter. They encompass provisions directed at certain types of litigation, such as damages actions,19 migration proceedings,20 industrial relations cases,21 or patent litigation,22 specific types of fees arrangements23 and particular types of conduct.24 In a number of situations there may be costs sanctions or disciplinary consequences for lawyers.25 Most of these provisions are limited in scope and apply only to selected participants in the civil justice system. All these measures stop short of imposing affirmative obligations on all participants to behave in a particular way.

All of these measures have one thing in common—they seek to improve the primary standard of conduct of various participants in the civil justice process and impose sanctions and penalties for nonconforming behaviour. A number of these developments are discussed in further detail below.

The commission has concluded that it is preferable for there to be more clearly defined and more broadly applicable provisions which seek to both constrain undesirable conduct and to affirmatively promote the expeditious, efficient and cost effective resolution of civil litigious disputes, not only through judicial determination of the merits but also through alternative dispute resolution. Placing the duties and responsibilities on the participants in civil litigation will facilitate the more effective operation of the civil justice system.

The submissions received by the commission were divided on some aspects of the proposals, and the final form of the recommendations has been modified in light of the views of various stakeholders. In particular, the criterion in relation to the merit of proceedings has been changed from the earlier proposal, and the previously proposed obligation to act in ‘good faith’ has been modified to an obligation to cooperate.

The general thrust of the commission’s proposals received significant support in submissions. The Supreme Court submitted that its capacity to implement the court’s objectives would be enhanced by the commission’s proposals. As the court noted:

Lawyers, and to a much lesser extent parties and witnesses, have a range of ethical and similar obligations under present law and practice … These obligations have developed in response

16 See, eg, J Spigelman, ‘Address’ (Speech delivered at the Medico-Legal Society of New South Wales Annual General Meeting) and J Spigelman, ‘Measuring Court Performance’ (Speech delivered at the 24th AIJA Conference, 16 September 2006, Adelaide. See also Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1, [172], [183] (Callinan J).


20 Legal Profession Act 2004 s 2.7.34.

21 Legal Profession Act 2004 s 2.7.33. See also ss 2.7.13, 2.7.14, 2.7.17, 2.7.32.


23 See, eg, the United Kingdom’s Civil Procedure Rules 1998 (SI 1998/2132) r 1.1(2)(a) in relation to the overriding objective. It states that one of the aspects of dealing with a case justly is ensuring that ‘parties are on an equal footing’.

24 See, eg, Legal Profession Act 2004 (NSW) s 345–4, discussed below. See also Philippa Alexander, ‘Reasonable Prospects of Success and Costs Orders against Solicitors’ (2006) 75 Precedent 44.

25 See Migration Act 1958 (Cth) ss 486E–486L, discussed below.

26 See Workplace Relations Act 1996 (Cth) s 676, 679.

27 Therapeutic Goods Act 1989 (Cth) s 26C.

28 See Legal Profession Act 2004 (Vic) s 3.4.28(4)(a).

29 For example, in Victoria document destruction is now a criminal offence. See the Crimes (Document Destruction) Act 2006, s 3.

30 See, eg, Lemoto v Able Technical Pty Ltd (2005) 63 NSWJR 300, where costs orders against a solicitor were overturned by the Court of Appeal as there was no prima facie case that the solicitor had provided legal services without reasonable prospects of success (see Alexander (2006) above n 24, 45), and Eurobodalla Shire Council v Wells & 2 Ors (2006) NSWCA 5 (21 February 2006), where Lemoto was applied and costs orders made against both a solicitor and a barrister. See also Migration Act 1958 (Cth) s 486F and Civil Procedure Act 2005 (NSW) s 56(5). The Therapeutic Goods Act 1989 (Cth) provides for a penalty of up to $10 million: s 26C(5).
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...to changes in the scope and nature of litigation over time. In the light of modern circumstances, it is appropriate to consider the consolidation and extension of these obligations, and bringing parties and witnesses more fully within their operation.31

Government departments, agencies and instrumentalities are frequent participants in litigation before Victorian courts. Given that they are already subject to self-imposed model litigant guidelines, the application of the proposed overriding obligations to such entities is unlikely to be problematic in policy terms. For other categories of litigants, and in particular corporations and self-represented litigants, other policy considerations need to be addressed.

Corporations are also frequent litigants, both as plaintiffs and defendants, and often have considerably greater resources, litigation experience and access to both in-house and external legal expertise than most individual litigants. They are also at an economic advantage insofar as their legal costs may be tax deductible. Because of the adversarial nature of civil litigation and the traditional emphasis on party control of the proceedings, litigants with greater resources and legal expertise are often in a better position to adopt strategic or tactical procedural moves designed to delay or frustrate the resolution of the dispute if the outcome is not considered likely to be to their commercial advantage. There may of course also be disparities in resources and expertise between individual litigants.

Although corporations may be resistant to the imposition of regulatory constraints on their behaviour as civil litigants, as several submissions received by the commission confirm,32 there are a number of reasons why the imposition of the proposed overriding obligations on corporations may be considered not only appropriate but also necessary.

In a forthcoming article, Cameron and Taylor-Sands outline the case for corporations to adopt a model litigant code and suggest how such a code might be implemented.33 The authors contend that some corporations34 should be subject to model litigant rules (similar to the overriding objectives recommended by the commission) in view of, inter alia:

- the similarities between corporations and governments, especially their status as frequent litigants
- the increasingly public role of corporations and their impact on the community
- the potential unfairness which results when government entities are subject to model litigant rules where their forensic adversaries are not
- the inadequacies of existing professional codes of conduct and civil procedure rules
- the application of ‘modern principles of corporate social responsibility’
- the limited and questionable effectiveness of adverse costs orders on well resourced litigants
- the desirability of creating a corporate culture of responsible litigation behaviour
- the fact that publicly funded litigation and dispute resolution systems are a ‘scarce’ resource and the consequent necessity for them to be managed wisely, especially by frequent users.35

The authors contend that there are special reasons why corporations should be subject to more onerous standards in the conduct of litigation than other litigants, and propose that a corporate model litigant code should be prepared by corporations rather than imposed by legislatures or regulatory authorities. In contrast, the commission’s recommendations would subject all litigants to the same obligations, which would be imposed by legislation.

Before further discussing the commission’s recommendations, the following part of this chapter examines existing legal and other obligations on participants in the civil litigation process.

3. EXISTING OBLIGATIONS ON PARTICIPANTS IN CIVIL LITIGATION

3.1 OVERRIDING OBJECTIVES

A number of major civil justice reviews in common law jurisdictions have sought to identify and articulate key aims, objectives and principles for the operation of the civil justice system and the courts.36
In some instances aspirations have been committed to court rules and given prominence. One notable example is Lord Woolf’s formulation of an ‘overriding objective’ stated at the outset of the Civil Procedure Rules (SI 1998/3132) which came into operation in late April 1999. Rule 1.1(1) provides that the ‘overriding objective’ of the rules is to enable the court to deal with cases justly. The rule goes on to provide that:

(2) Dealing with a case justly includes, so far as is practicable:
   (a) ensuring that the parties are on an equal footing;
   (b) saving expense;
   (c) dealing with the case in ways which are proportionate—
      (i) to the amount of money involved;
      (ii) to the importance of the case;
      (iii) to the complexity of the issues; and
      (iv) to the financial position of each party;
   (d) ensuring that it is dealt with expeditiously and fairly; and
   (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.\(^{31}\)

The court must seek to give effect to the overriding objective when it exercises any power under the rules or interprets any rule.\(^{38}\) The parties are required to help the court to further the overriding objective.\(^{39}\)

The rules also provide that the court must further the overriding objective by actively managing cases.\(^{40}\) Active case management is defined to include:

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.\(^{41}\)

Notably the ‘overriding objective’ in the rules imposes the principal obligation on the court, rather than explicitly imposing it directly on the participants. This reflects the shift in emphasis precipitated by the Woolf reforms:

Control over litigation has been taken away from the parties and entrusted to the court, thereby enabling the court to determine the best way of proceeding to a resolution of the dispute. To this end, an overriding objective has been elaborated in order to guide the court in exercising both its new case management powers and its traditional discretion in matters of procedure.\(^{42}\)

The Civil Procedure Rules also seek to change the behaviour of the parties who are required to help the court to further the overriding objective.

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31 Submission CP 58 (Supreme Court of Victoria). However, the submission points out that the ‘view is not universally held by Judges of the Court’.
32 See the discussion of submissions at the end of this chapter.
33 Camille Cameron and Michelle Taylor-Sands, “Corporate Governments” as Model Litigants” (2007) 10(2) Legal Ethics (forthcoming).
34 The article does not define the boundaries for determining which corporations should be subject to such a code.
35 Cameron and Taylor-Sands (2007) above n 33, 1, 11–12, 16.
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The rules require the court to encourage ‘the parties to co-operate with each other in the conduct of the proceedings’. These obligations indirectly apply equally to the lawyers (as representatives of the parties). As Professor Zuckerman notes, this has resulted in a significant cultural change:

Before the CPR, parties had no comparable duty. They were of course obliged to perform their process duties, but beyond that they were free to refrain from responding to questions from their opponent, free to withhold information unless and until they came under a disclosure duty, free to resist settlement negotiations and free to treat any approach from an opponent with disdain. If they engaged in negotiations, they remained free to drag out the talks to no end other than to make their opponent’s life difficult.

The approach to reform adopted by the commission is similar to but different in focus from the Woolf approach. Thus, for example, the commission’s recommendations place a direct affirmative obligation on the parties to cooperate both with the other parties and with the court, rather than merely imposing an obligation on the court to encourage the parties to cooperate with each other.

To date, various aspirational statements have been implemented or recommended for inclusion in statutes and rules of court in some Australian jurisdictions.

In NSW in 2000 a new overriding purpose was inserted at the commencement of the Supreme Court Rules. This stated that the objective of the rules was to facilitate the ‘just, quick and cheap’ resolution of the real issues in the proceeding. In 2005, with the implementation of the Civil Procedure Act 2005 (NSW), the overriding purpose was given statutory status and obligations extended to the court, the parties and their legal representatives. Section 56 states:

1. The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
2. The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
3. A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
4. A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified in subsection (3).
5. The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

At the same time the Uniform Civil Procedure Rules 2005 (NSW) were implemented. The overriding purpose is echoed in rule 2.1 regarding the making of directions and orders for the ‘just, quick and cheap’ disposal of proceedings.

In Queensland, the Uniform Civil Procedure Rules 1999 set out the overriding obligations of the court and the parties and specifically provide for sanctions for noncompliance. Rule 5 provides:

Philosophy—overriding obligations of parties and court
1. The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.
2. Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
3. In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
4. The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

The example which accompanies the rules elaborates that the ‘court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court’.
In South Australia, rule 3 of the Supreme Court Civil Rules 2006 provides that the objects of the rules are:

(a) to establish orderly procedures for the just resolution of civil disputes; and
(b) to facilitate and encourage the resolution of civil disputes by agreement between the parties; and
(c) to avoid all unnecessary delay in the resolution of civil disputes; and
(d) to promote efficiency in dispute resolution so far as that object is consistent with the paramount claims of justice; and
(e) to minimise the cost of civil litigation to the litigants and to the State.

In Victoria the Magistrates’ Court has, since 1 January 2005, had overriding objective and case management rules which are substantially similar to the Civil Procedure Rules in the United Kingdom.\(^5\) As with the Woolf approach, the overriding objective is framed as a paramount concern for the conduct of the court’s business.\(^5\)

This approach can be contrasted with the current rule 1.14(1)(a) of the Victorian Supreme Court (General Civil Procedure) Rules 2005. This rule requires the court, in exercising any power under the rules, to ‘endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined’. Although the rule seeks to achieve the same outcome as the UK rules’ overriding objective, it does not explicitly address many of the specific matters addressed in other models. For example, it does not refer to the issue of ‘proportionality’.\(^5\)

In its submission to this review, the Supreme Court of Victoria indicated that it has considered whether rule 1.14:

might be expanded and strengthened to make explicit aspects of the Court’s inherent power to control its own proceedings, to encourage proportionality, and to foster a culture of just and efficient dispute resolution.\(^5\)

The submission notes that:

“There is a view within the Court that an expanded version of Rule 1.14 would have a positive impact, particularly in stating the obligations of parties and their legal practitioners to conduct litigation with regard to the overriding objective. Such provisions may provide an appropriate preamble or ‘objects clause’ to the Rules, similar to those found in modern legislation.”\(^4\)

While the submission points out that there is a view within the court that the inclusion of provisions of this type in the rules would be appropriate, it also indicates that this view is not universally held by the judges of the court.

The Supreme Court has also given consideration to how an expanded rule might be drafted and has taken sections of the Civil Procedure Act 2005 (NSW) as a model. The draft prepared by the Supreme Court provides as follows:

1. **Overriding Purpose**
   
   (1) The overriding purpose of these rules is to facilitate the just, quick and cost effective resolution of the real issues in any proceedings governed by these rules.
   
   (2) The Court shall seek to give effect to the overriding purpose when it interprets or exercises any of the powers given to it by these rules.

2. **Obligations of the parties**
   
   (1) A party to a proceeding governed by these rules shall assist the court to further the overriding purpose and, to that effect, shall participate in the processes of the court and comply with all directions and orders of the court in the proceeding.
   
   (2) A practitioner shall not by his or her conduct cause his or her client to be put in breach of paragraph (1).
   
   (3) The Court may take into account any failure to comply with paragraph (1) or (2) in exercising its discretion with respect to costs.
3 Order and directions

For the purpose of furthering the overriding purpose referred to in rule 12A(1), the court in making any order or giving any direction in a proceeding governed by these rules and generally in the management of any such proceeding—

(a) shall have regard to the following objects:

(i) the just determination of the proceeding;
(ii) the efficient disposal of the business of the Court;
(iii) the efficient use of available judicial and administrative resources; and
(iv) the timely disposal of the proceeding; and

(b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:

(i) the degree of difficulty or complexity of the issues in the proceeding;
(ii) the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps;
(iii) the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties;
(iv) the degree to which the respective parties have complied with Rule 1.12B(1)
(v) the use that a party has made or could have made of any opportunity that was available in the course of the proceeding, whether under these rules, the practice of the court or any order made or direction given in the proceeding; and
(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction under consideration.

4 Delay and proportionality of costs

In any proceeding governed by these rules, the practice and procedure of the court should be implemented with the following objects:

(a) the elimination of any lapse of time between the commencement of the proceedings and its listing for trial beyond that which is reasonably required for the interlocutory steps necessary for the fair and just determination of the issues in dispute and the preparation of the case for trial; and

(b) the resolution of the issues between the parties in such a way that the costs of the proceeding are proportionate to the importance and complexity of the subject matter of the dispute, including the amount involved.  

The ‘overriding purpose’ provision drafted by the commission is based on but differs in some respects from that proposed by the Supreme Court.

While supporting the expansion of obligations on lawyers, parties and witnesses in principle, the court notes that ‘the obligations would have to be defined with care, in consultation with the courts and the profession’. However, it considers the draft overriding purpose as supplying ‘a basis for moving forward’. As noted above, the earlier draft proposal prepared by the commission was modified following further consultations with the Supreme Court, other judicial officers and the profession. The value of aspirational statements, particularly as a tool for facilitating change in litigation culture, has been noted in law reform contexts and elsewhere.

In 1999, the Law Reform Commission of Western Australia recommended the development of a set of objectives to be incorporated into civil justice legislation to be used as a ‘guide to the interpretation of legislation and rules in order to provide standards against which lawyers’ and others’ conduct can be assessed’. 

In Going to Court the concept of an overriding objective was considered a ‘good idea’ with the potential “to operate at a broad, strategic policy level for the system as a whole”.60 It was also considered an ‘extremely useful point of reference for individual courts, judicial officers and lawyers in dealing with particular pieces of litigation’.60

Recently the Federal Litigation Section of the Law Council recommended the insertion of an ‘overriding objective’ in the Federal Court Rules.61 While noting that the insertion of ‘mere words … will do little to transform attitudes’, the council suggested that it may signal a desire by the court for a change ‘if accompanied by strong action by the judges of the Court to make it clear that delay, continued disregard of directions, obfuscation and conduct which clearly is likely to be far more productive of an increase in costs and delays than in resolution of true issues in the proceeding, will be dealt with harshly’.62

Speaking of the NSW experience, Justice Hamilton of the Supreme Court of NSW and chair of the NSW Attorney General’s Working Party on Civil Procedure has said:

I must admit that I was something of a sceptic (although not an opponent) when [the overriding purpose] was introduced in 2000, avowedly as a culture changing measure. I have since become a devotee. I have found the ability to refer to the rule in court very useful in dealing with recalcitrant parties. I have also found it a useful way of reminding practitioners of their duties in this regard, without the appearance of personal criticism of one side’s representatives.63

In consultations, Chief Magistrate Ian Gray commented similarly that the insertion of the overriding objective had proved a useful judicial tool.64

Conversely, the limitations of such statements have also been noted. For instance in Going to Court it was noted that:

Even those who are attracted in principle to the approach [of an overriding objective] may tend to say that stating aspirations of this nature is simple enough but giving them meaning and putting flesh on them are very different matters.65

Rule 11 of the United States Federal Rules of Civil Procedure provides an example of a mechanism aimed at regulating litigation conduct with the added consequence of explicit sanctions. The rule provides that ‘every pleading, written motion and other paper [presented to the court shall be signed by at least one attorney of record,’ or, if the party is not represented by an attorney, shall be signed by the party.66 By signing the document the attorney (or party) certifies that:

• the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase in the cost of litigation

• the claims, defences and legal contentions are warranted by existing law or by nonfrivolous argument [for the modification of the law]

• any allegation and other factual contentions or denials of such have evidential support.67

The scope of the rule is very broad. Moreover, sanctions may be imposed on lawyers, law firms, or parties who are responsible for any violation of the requirements.

In Managing Justice, the ALRC recommended that ‘the thrust of Rule 11 of the United States Federal Rules of Civil Procedure … be incorporated into Australian federal court and tribunal rules and professional practice rules’.68 The ALRC was of the view that the wording of the provision should, however, be changed in the Australian context. It suggested that “the requirement should be couched in terms of “to the best of the practitioner’s knowledge or information”’, omitting the word “belief”’.69 There has been further support for the implementation of such a requirement by judges such as Justice David Ipp, who has argued that rule 11 ‘could well be a model in Australia for legislative regulation of the conduct of lawyers’.70

Overall, the ALRC did not support a ‘broad statement of lawyer, litigant and litigation objectives’.71 Rather, it favoured statements of express obligations, which lawyers owe the administration of justice.72 The ALRC noted several arguments for and against the implementation of rules and laws of court to regulate litigation conduct. Interestingly, it noted the US experience of standards enshrined as rules of court as an example of standards being ‘utilised as part of the battle of litigation’.73
3.2 LAWYERS’ DUTY TO THE COURT

It is trite to say that lawyers owe a paramount duty to the court. This takes precedence over other duties, including the duty owed to the client.74 The ‘duty to the court’ is often referred to interchangeably as the ‘duty to the administration of justice’.75

This general duty to the court has been described as an ‘omnibus’ duty.76 It comprises a number of discrete duties which ‘have developed over time as a network of pragmatic rules laid down by judges in circumstances very much of an ad hoc nature’.76

One difficulty with concurrent duties and obligations to clients, other lawyers and to the court is that there will inevitably be tension between these requirements. Moreover, as noted by Professor Richard Abel:

A duty cannot be both paramount and subordinate … lawyers offer no principled basis for accommodating those inconsistent loyalties.77

Recently, the High Court78 summarised the duties on lawyers in terms of:

- not deceiving the court
- not withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas
- not abusing the process of the court by preparing or arguing unmeritorious applications
- not wasting the court’s time by prolix or irrelevant arguments
- not coaching clients or their witnesses as to the evidence they should give
- not using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.79

The High Court also pointed to the duty to inform the court of the authorities which bear on the matters in issue, irrespective of whether or not a particular authority assists the client’s case.80

The duties have also been categorised as principally the duty:

- of disclosure to the court
- to avoid abuse of the court process
- not to corrupt the administration of justice
- to conduct cases ‘efficiently and expeditiously’.81

At least in England and Australia, the duties ‘have not been collected and systematised as a principled, structured body of law’.82

There are, however, important recent changes. In the United Kingdom, advocates and litigators are now subject to statutory duties to act ‘with independence in the interest of justice’ and to comply with the rules of conduct of their respective professional bodies.83 More recently in the United Kingdom, new statutory obligations relating to persons appearing as advocates or conducting proceedings before courts were introduced by the Legal Services Act 2007 (c 29).

Section 188 sets out the duties of advocates and litigators. The provisions apply to a person who ‘(a) exercises before any court a right of audience, or (b) conducts litigation in relation to proceedings in any court by virtue of being an authorised person in relation to the activity in question’.84

Any person to whom the provisions apply ‘has a duty to the court in question to act with independence in the interests of justice’.85 Moreover, it is provided that that duty, and the duty to comply with relevant conduct rules imposed on the person,86 ‘override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them’.87

In Australia there is no statutory statement of lawyers’ general duty to the court. However, various specific duties to the court are addressed in professional rules, which are subject to a general move toward consistency across jurisdictions.

The Law Council of Australia’s Model Rules of Professional Conduct and Practice (2002) state that in respect of advocacy and litigation:

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence,
honesty and candour. Practitioners should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.\(^{38}\)

This statement appears in professional rules, eg, in the ACT, NSW, NT and SA. In Victoria it appears as the preamble in the Law Institute of Victoria’s *Professional Conduct and Practice Rules 2005*.\(^{39}\) It precedes rules which address the duty to the client, independence, frankness in court (including not misleading the court), delinquent or guilty clients, responsible use of privilege, integrity of evidence, communications with opponents, integrity of hearings and prosecutor’s duties.

In most jurisdictions, the rules regulating the conduct of barristers state that ‘the administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice’.\(^{40}\)

In Victoria, the Bar Rules do not provide a specific statement of a paramount duty but address a range of matters, including:

- not knowingly misleading the court\(^{41}\)
- exercising independent judgment (including deciding which witnesses to call, what questions to ask in cross-examination and which issues are to be raised)\(^{42}\)
- providing assistance to the court (including informing the court of any misapprehension by the court as to the effect of an order which the court is making)\(^{43}\)
- not assisting improper conduct (including not pleading an allegation without a proper factual basis\(^{44}\) or not alleging fraud, misconduct or dishonesty without a proper factual basis\(^{45}\) and not casting unjust aspersions)\(^{46}\)
- dealing properly with witnesses.\(^{47}\)

The New South Wales Barristers’ Rules address similar matters but go a step further and provide a specific duty to advance the ‘efficient administration of justice’.\(48\) The Rules were amended in 2000 to include new rules, which emphasise a barrister’s responsibility in ensuring the efficient and expeditious conduct of their work. In particular the relevant rules require that a barrister:

- complete work which they are briefed to do ‘in sufficient time to enable compliance with orders, directions, rules or practice notes of the court’\(^{49}\)
- ‘confine the case to identified issues which are genuinely in dispute’
- have the case ready to be heard as soon as practicable
- present the identified issues in dispute clearly and succinctly

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79 D’Orta-Ekenaike (2005) 223 CLR 1, 41.


81 Ibid.

82 Ibid.

83 See ss 27(2A) and 28(2A) of the *Courts and Legal Services Act 1990* (UK) (c 41).

84 *Legal Services Act 2007* (c 29) ss 188(1)(a), (b).

85 *Legal Services Act 2007* (UK) (c 29) s 188(2). See also s 1(3)(d) in respect of the regulatory objectives of the legislation.

86 The duty is imposed by s 176(1) of the *Legal Services Act 2007* (UK) (c 29).

87 *Legal Services Act 2007* (UK) (c 29) s 188(3).


92 Ibid r 16, 17, 18.

93 Ibid r 28.

94 Ibid r 32, 35.

95 Ibid r 34, 38, 42.

96 Ibid r 31, 37.

97 Ibid r 44, 45.


99 Ibid r 41(a).
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- limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client’s interests which are at stake in the case
- occupy as short a time in court as is reasonably necessary to advance and protect the client’s interests which are at stake in the case’.

Rule 23 of the New South Wales Barristers’ Rules also expressly imposes a duty to ensure the court is not misled because of an opponent’s error, and promotes an obligation of candour.

The explicit expression of a lawyer’s duty to conduct cases efficiently and expeditiously reflects the ‘current changes in community attitudes and standards’. It is also consistent with statements of aspirations and objectives aimed at promoting the just, efficient and economical resolution of civil claims that now appear in court rules in the United Kingdom and Australia, as discussed above.

It has been noted by English courts that the balance between a lawyer’s duty to the court and the duty to the client may be subject to ‘evolutionary change within the civil justice system’. Traditionally, the duty to the client has involved advancing and protecting the client’s interests by every legitimate means. This should be ‘to the best of the [lawyer’s] skill and diligence, uninfluenced by the [lawyer’s] personal view of the client or the client’s activities, and notwithstanding any threatened unpopularity or criticism of the [lawyer]’.

A lawyer is also obliged to act ‘honestly’, ‘fairly’ and with ‘competence and diligence’ in the service of the client.

While observing and upholding his or her duties to the client, a lawyer must first and foremost comply with the duties to the court. Where the duties conflict, ‘the duty to the court is paramount’ and the lawyer must comply with it even if to do so is ‘contrary to the interests or wishes of the client’.

Despite these long-standing principles and perhaps as a consequence of adversarialism, it has been suggested that:

In practice, it is generally recognised that interests of the client are given greater weight by lawyers. Duties to the administration of justice may also be interpreted narrowly so that they do not restrict a lawyer’s ability to present the best possible case for their client.

For example, distinctions may be made between falsifying evidence and not disclosing evidence, including unfavourable expert evidence. Other strategies may include issuing or pleading claims or defences which have little or no legal merit, not admitting facts known to be true, using dubious litigation tactics (such as burying critical documents in voluminous discovery) or not acting cooperatively or candidly with an opponent.

In many instances there may be a fine line between what is forensically acceptable and what is professionally prohibited. In D’Orta the High Court noted that:

Under the adversarial system of justice, a barrister has no obligation to the court to assist an opponent to prove a cause of action or defence. A barrister is under no obligation to tell an opponent or a witness anything that may assist the opponent’s cause. Nor does a barrister owe a duty to the court to assist the opponent to plead the facts in a way best calculated to obtain a just result according to law. As long as the barrister does not mislead the court, he or she is entitled to make the opponent prove that person’s case even though the barrister knows that the facts alleged by the opponent are true.

The proposition that a lawyer is ‘under no obligation to tell an opponent … anything that may assist the opponent’s cause’ is, as noted by the High Court, subject to the requirement that the court not be misled. There may of course be circumstances where the failure to disclose factual information known to lawyers and their clients may mislead the other parties and the court.

In a recent Queensland case, in the course of a mediation leading to a settlement, medical information became known to a barrister and his client that the projected life expectancy of the client might be reduced because of a recently discovered medical condition. This was likely to have an important bearing on the quantum of damages payable for the personal injuries giving rise to the claim. The case was settled without disclosure of this information. The defendant and the defendant’s insurer subsequently became aware of this information and this resulted in an application to have the settlement set aside and disciplinary proceedings against the barrister. The Legal Services Tribunal found the barrister guilty of professional misconduct for the failure to disclose the recently discovered medical evidence.
The commission does not believe there is cause for serious concern about the conduct of lawyers or litigants in most cases in Victorian courts. However, it believes the existing civil procedural rules and the practices of the profession and litigants do not always facilitate the most efficient, economical and expeditious resolution of civil litigation, particularly in the higher courts in Victoria.

Accordingly, the commission has concluded that it is desirable to explicitly ‘strengthen … the duty to the court’ with a view to achieving reform. A statutory statement of lawyers’ duty to the court would serve to emphasise the paramountcy of this obligation. If the statement is expressed to be ‘overriding’, this would clarify that it prevails over any other legal or ethical duties to the extent of any inconsistency. Further, by extending the duty to other participants in the civil justice system, particularly the parties to litigation, there would be symmetry of obligation and less scope for conflict of duties between lawyers and clients.

3.3 DUTIES OF THE PARTIES

The efficient and effective operation of the civil justice system is influenced not only by the behaviour of lawyers, but also by the behaviour of the parties themselves.

Parties are bound to comply with the orders of the court and are subject to proceedings for contempt. Abuses of court process and failure to comply with obligations, such as for discovery, can result in adverse costs orders, dismissal of proceedings or the entry of judgment.

However, traditionally parties to civil litigation do not owe a direct duty to the court, nor are they governed by specific obligations and responsibilities or codes of conduct. In these respects, they are not subject to the same influences and constraints on their conduct as lawyers appearing before the court.

As the ALRC has noted:

> While practice rules assist to define appropriate conduct for lawyers, many of the conduct issues associated with litigation concern not lawyers, but the litigants themselves. The justice system would operate quite differently if all litigants were reasonable, prudent, cooperative and fair.

In its submission the Supreme Court of Victoria points out the role and influence of the parties as ‘direct participants in litigation’. As the court notes:

> Usually following legal advice, they initiate and defend proceedings and seek and oppose orders. On their instructions, steps are taken in litigation. Parties are therefore in a special position to influence the conduct of litigation.

Issues in relation to the conduct of parties are often apparent in cases involving self-represented litigants. Parties who do not have a professional intermediary may lack the knowledge, experience or insight to act in the most appropriate manner or to modify their conduct in accordance with the requirements of the civil litigation process. As the Australasian Institute of Judicial Administration has noted:

> The court system is designed to operate on a professional level with the participants in the process having various duties to the court. The courts and the legal profession are interdependent. Not being part of this system and bearing no duties to the court, litigants in person will inevitably create problems for courts that are not able to be easily or wholly resolved. They should be aware they face difficulties which may prejudice the proper presentation of their case. It should not be thought that the system could operate effectively or efficiently unassisted by barristers and solicitors in most cases.

As discussed above, in recent years there have been developments in civil justice reform. In some jurisdictions court rules and statutes have been introduced to impose obligations on the parties and some other participants (as well as lawyers), with a view to modifying conduct and encouraging appropriate forensic behaviour.
However, as the Federal Civil Justice System Strategy Paper has noted, self-represented litigants are less likely than lawyers to be viewed as owing formal duties to the court. The lack of formal duties, especially the duty to ensure the ‘speedy and efficient administration of justice’, combined with an apparent lack of understanding about the rules of the game, present particular challenges for the courts and parties involved in litigation against [a self-represented litigant].

Some courts are beginning to extend their scrutiny of conduct to litigants who are self-representing, as well as to lawyers. Further consideration of this initiative is to be encouraged, recognising that, if courts require [self-represented litigants] to do what they can to ensure they are fully informed about how to run their cases and properly prepared, the courts have a concomitant responsibility to provide the information and infrastructure to enable them to do so.

Importantly, the expansion of obligations to the parties to litigation has received support from the Supreme Court, which submitted that:

Because [the parties] make many of the important decisions about the initiation and conduct of litigation, it is appropriate to consider bringing them into a system of broader obligations. Such a system should apply equally to all the key participants, and it is difficult to see how it could be workable if the parties and their lawyers were not bound by the same essential rules.

The development of obligations to act ‘in good faith’ has been one area where recent statutory provisions, common law developments and civil procedural reforms have sought to influence the litigious and other conduct of both lawyers and litigants.

In the context of contractual relationships, courts have been grappling with the question of whether, independently of the express terms of contract, parties have an obligation to each other to act in good faith. In some instances courts have also dealt with contractually imposed express obligations to act in good faith in circumstances where parties have proceeded to litigation allegedly without complying with such obligations.

Perhaps more relevant for present purposes are statutory obligations imposed on parties to act in good faith. In the area of insurance law, such obligations between insurers and the insured have a long history. More recently, various statutes have imposed more broad-ranging good faith obligations, including in respect of the conduct of negotiations and mediations.

Section 31(1) of the Native Title Act 1993 (Cth) relevantly provides:

(1) Unless … the Government party considers the act attracts the expedited procedure:

(a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and

(b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:

(i) the doing of the act; or

(ii) the doing of the act subject to conditions to be complied with by any of the parties. [emphasis added].

In Western Australia v Taylor the tribunal member set out a list of indicators in relation to the Native Title Act 1993 (Cth) which assist in determining whether negotiations have been conducted in good faith. These include:

- unreasonable delay in initiating communications in the first instance;
- failure to make proposals in the first place;
- the unexplained failure to communicate with the other parties within a reasonable time;
- failure to contact one or more of the other parties;
- failure to follow up a lack of response from the other parties; …
- failure to take reasonable steps to facilitate and engage in discussions between the parties;
- failing to respond to reasonable requests for relevant information within a reasonable time;
• stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
• unnecessary postponement of meetings;
• sending negotiators without authority to do more than argue or listen;
• refusing to agree on trivial matters …;
• shifting position just as agreement seems in sight;
• adopting a rigid non-negotiable position;
• failure to make counter proposals;
• unilateral conduct which harms the negotiating process …;
• refusal to sign a written agreement in respect of the negotiation process or otherwise;
• failure to do what a reasonable person would do in the circumstances.121

There has been extensive case law developed on the meaning of ‘good faith’ in contract law and more recently in the area of mediation.

In Hooper Bailie Associated Ltd v Natcon Group Pty Ltd122 Justice Giles outlined what the obligation to participate in ADR in good faith might mean. This involves a willingness to ‘subject oneself to the process of negotiation or mediation, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate, and a willingness to give consideration to putting forward options for resolution of the dispute’. However, the obligation to participate in good faith does not oblige a party ‘to act for or on behalf or in the interests of the other party or to act otherwise than by having regard to self-interest’.123

The Law Reform Commission of Western Australia in 1999 suggested that the expectation that parties make a good faith effort to resolve the dispute by an appropriate method of ADR means only that parties are expected to reconsider those parts of their case which they accept, or after discussion realise, are not clear or strong.

The National Alternative Dispute Resolution Advisory Council (NADRAC) has said that although there is value in making parties participate fully in ADR so as to allow constructive discussion and to narrow the issues in dispute,124 it does not favour the use of the term ‘in good faith’ because of its legalistic overtones.125 NADRAC suggests that it may be preferable to require parties to use their ‘best endeavours’ during an ADR process to work towards a resolution of the dispute, and that such a requirement may deter a party from behaving unreasonably or from walking out of the ADR process.126

NADRAC has also noted that a party who does not want to participate in ADR and is compelled to do so may not participate in good faith and this may render the process unsuccessful and even harmful by increasing costs and delay.127

In Australia, there are a number of statutory provisions that require parties to participate in ‘good faith’ in a mediation. For example, section 27 of the Civil Procedure Act 2005 (NSW) provides that it is the ‘duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediator’. The Farm Debt Mediation Act 1994 (NSW) also requires parties to mediate in good faith, and section 11 of the Act provides for consequences where parties do not take part in ‘mediation in good faith’. The Therapeutic Goods Act 1989 (Cth) provides that where a person intends to commence certain proceedings under the Patents Act 1990 for infringement of a patent for therapeutic goods, the person is required to certify that the proceedings are to be commenced in good faith.128

The concept of ‘good faith’ is referred to in the US Federal Rules of Civil Procedure. As noted by the Supreme Court in its submission, rule 37 (relating to discovery) requires parties to undertake ‘good faith attempts at resolving interlocutory disputes before bringing applications … These are made enforceable by costs and other penalties which may be imposed on clients or their attorneys’.129

The Productivity Commission is currently examining the notion of ‘good faith’ in the context of Australia’s consumer policy framework.130

114 See, eg, Family Law Rules 2004 (Cth) rr 1.04–1.08.
116 Submission CP 58 (Supreme Court of Victoria).
120 (1996) 134 FLR 211.
121 Western Australia v Taylor (1996) 134 FLR 224–5.
122 (1992) 28 NSWLR 194 at 196.
123 See also Aiton v Transfield (1999) NSWSC 956 (156 per Einstein J), generally affirming Hooper Bailie .
126 NADRAC (November 2006) above n 124.
127 NADRAC submission to Review of the Franchising Code of Conduct, above n 125.
129 See Productivity Commission, Review of Australia’s Consumer Policy Framework, draft report (2007). The Commission considers that the high level objective for the future consumer policy framework should be ‘to promote the confident and informed participation of consumers in competitive markets in which consumers and suppliers can trade fairly and in good faith’.
3.4 MODEL LITIGANT GUIDELINES

Governments, their agencies and statutory authorities are important ‘repeat’ litigants in civil proceedings before Victorian courts. Such bodies have already taken the lead in terms of forensic duties and obligations by imposing on themselves, and on lawyers acting on their behalf, model litigant guidelines.

The development of model litigant guidelines represents an important mechanism for the setting of high forensic standards and the regulation of the conduct of parties in civil litigation.

Both Commonwealth and state governments have now adopted model litigant guidelines. These apply to government departments and agencies, as well as to the lawyers representing government interests.

In Victoria, the guidelines apply to:

- government departments and agencies, as well as ministers and officers where the government provides a full indemnity in respect of an action for damages brought against them personally
- lawyers representing government interests, including private lawyers, departmental lawyers and government solicitors.

The guidelines are also adhered to by some independent statutory bodies.

The obligations apply to litigation, including ‘before courts, tribunals, inquiries and in arbitration and other dispute resolution processes’. They extend to all litigation involving the government, irrespective of its status as plaintiff, defendant or third party.

As well, the guidelines refer to the handling of ‘claims’ and specifically to avoiding litigation, where possible. They apply before proceedings are commenced and cover the process of asserting or responding to a claim and to negotiations.

To a large extent the model litigant guidelines represent the codification of long-established principles concerning the manner in which governments should conduct themselves as litigants.

For example, in 1912 Chief Justice Griffith in Melbourne Steamship Co Ltd v Moorehead referred to the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary.

As a participant in the civil justice system, the government is entitled to pursue its substantive rights. However, the position of the government differs from that of other litigants as it ‘has no private or self-interest of its own separate from the public interest it is constitutionally bound to serve’.

This absence of self-interest provides the philosophical basis for the legal expectations of fair play manifested in the model litigant guidelines:

Having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

The guidelines are also a reflection of policies in the law: (a) of protecting the reasonable expectations of those dealing with public bodies; (b) of ensuring that the powers possessed by a public body, “whether conferred by statute or by contract”, are exercised “for the public good” … and (c) of requiring such bodies to act as “moral exemplars”.

As Cameron and Taylor-Sands note, justification for a model litigant code for governments also arises out of their role as repeat players in litigation, thus giving rise to advantages over other litigants through their greater expertise, experience, access to specialist knowledge and established reputation before the courts and tribunals.

As they also note, at the Commonwealth level, compliance with model litigant guidelines is also consistent with the statutory obligations to manage agency affairs in a way that promotes the efficient, effective and ethical use of government resources.
The Commonwealth first formalised the model litigant guidelines in 1995 by way of Attorney-General’s Legal Practice Guidelines on Values, Ethics and Conduct, which was intended to supplement the professional conduct rules applicable to lawyers. The guidelines were expanded, made applicable to private lawyers acting on behalf of government departments and agencies and adopted as legally binding statutory obligations in 1999.

Further amendments were subsequently made and revised Model Litigant Rules came into force on 1 March 2006. In Victoria the guidelines have been in place since 2002. The Victorian guidelines represent a ‘best practice’ model and are not legally enforceable as such.

The Victorian guidelines substantially mirror the Commonwealth version, with a number of exceptions. Underpinning the guidelines is the model litigant principle, which obliges the government to act as a model litigant for the purpose of maintaining ‘proper standards in litigation’.

In summary, a model litigant is required to ‘act with complete propriety, fairly and in accordance with the highest professional standards’. The guidelines also state that:

The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

The guidelines set out the nature of the obligation. They prescribe certain conduct and prohibit other behaviour. Both the Commonwealth and Victorian provisions require the government and its agencies to:

- act fairly …;
- act consistently …;
- avoid litigation, wherever possible;
- pay legitimate claims without litigation; and
- … keep costs of litigation to a minimum.

They also require that the government:

- not rely on technical defences …;
- … not take advantage of a claimant who lacks resources to litigate a legitimate claim … and
- … not undertake and pursue an appeal unless [it] believes that it has reasonable prospects for success or the appeal is justified in the public interest.

In addition the Commonwealth Rules impose obligations on the government:

- to deal with claims promptly and not cause ‘unnecessary delay’ and
- to apologise ‘where the Commonwealth or its agency … have acted wrongfully or improperly’.

In the 2005 amendments, which came into force on 1 March 2006, the Commonwealth Rules adopted a positive obligation to consider the use of ADR processes. The Commonwealth

131 See Annexure B to the Legal Services Direction 2005 made under s 55ZF of the Judiciary Act 1903 (Cth) (referred to as the ‘Commonwealth Model Litigant Guidelines’) and Department of Justice, Guidelines on the State of Victoria’s Obligation to Act as a Model Litigant (“Victorian Model Litigant Guidelines”) (these guidelines were originally contained in the State of Victoria, Legal Services to Government Panel Contract (2002)).

132 Commonwealth Model Litigant Guidelines, above n 131, Note 1 and Victorian Model Litigant Guidelines, above n 131, Note 2.

133 Ibid.


135 Commonwealth Model Litigant Guidelines, above n 131, Note 1; Victorian Model Litigant Guidelines, above n 131, Note 2.


137 (1912) 15 CLR 333.


139 Hughes Aircraft Systems International v Airservices Australia ([‘Hughes Aircraft Systems’] (1997) 76 FCR 151), 196 (Finn J). See also ALRC(2000) above n 12, [3.5].


142 Ibid 504–6.

143 See the Financial Management and Accountability Act 1997 (Cth) s 44, referred to in ibid 506. Financial Management Act 1994 ss 23C, 23D promote similar objectives of financial responsibility, and several provisions of the Audit Act 1994 relate to the Auditor-General’s role in ensuring that business practices in Victoria are economical and efficient (see, eg, ss 1, 3A, 15, 16A and 16C).


145 Commonwealth Model Litigant Guidelines, above n 131, introduced by the Judiciary Amendment Act 1999 (Cth).


147 Victorian Model Litigant Guidelines, above n 131, [1].


149 Commonwealth Model Litigant Guidelines, above n 131 Note 2; Victorian Model Litigant Guidelines, above n 131 Note 3.

150 Commonwealth Model Litigant Guidelines, above n 131 Note 3, Victorian Model Litigant Guidelines, above n 131 Note 4.

151 Victorian Model Litigant Guidelines, above n 131 (2)(a)-(e) (See also the Commonwealth Model Litigant Guidelines, above n 131 [2]).

152 Victorian Model Litigant Guidelines, above n 131 (2)(f)-(h) (See also the Commonwealth Model Litigant Guidelines, above n 131 [2]).

153 Commonwealth Model Litigant Guidelines, above n 131 (2)(a).

154 Commonwealth Model Litigant Guidelines, above n 131 (2)(b).

155 Commonwealth Model Litigant Guidelines, above n 131 (2)(c).
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Rules also provide that when participating in ADR, the Commonwealth and its agencies are to:

(a) participate fully and effectively, and
(b) wherever practicable, ensure that their representatives have authority to settle the matter, or at least clear instructions on the possible terms of settlement that would be acceptable to the Commonwealth, so as to facilitate appropriate and timely resolution of a dispute.156

These amendments reflect the implementation of a recommendation contained in the Federal Civil Justice System Strategy Paper.157

In the Victorian Attorney-General’s Justice Statement published in 2004 it was stated that:

The Government will review its model litigant policy to determine whether there is scope to emphasise the desirability of using ADR for some types of dispute. In doing so, the Government will be mindful of a tendency for some litigants to sue the Government on the basis of its ‘deep pockets’ in the hope of achieving a settlement regardless of the merits of the claim, but it will also recognise that it can take a leading role in encouraging the use of non-litigious dispute resolution.158

To date there has been no amendment of the Victorian guidelines in accordance with this stated policy.

Apart from providing a tool for managing the behaviour of participants in the civil justice system, the model litigant guidelines also have the potential to be influential in precipitating cultural change. For instance, the TAC comments:

It is an area where you need to be bold in how you implement the cultural changes needed to be open, honest, fair and reasonable and then placing business metrics around this. We have a detailed program in place, with metrics, and regularly test the business controls through our internal audit program.159

The TAC also sees the guidelines as encouraging its employees to be open, honest, fair and reasonable—that way, we are focussed on risk mitigation, more so than breaches.160

A paper by the Assistant Victorian Government Solicitor comments that:

Far from being a handicap that fetters the State, I see the model litigant obligation as a prism within which to assess the State’s conduct to ensure the highest standard of propriety and ethics are met.161

The potential for the guidelines to extend beyond government has been raised by several commentators.

The ALRC has noted that:

If all parties acted as model litigants, the civil justice system would be more effective and efficient.162

In Managing Justice the ALRC also suggested that, notwithstanding government’s particular role in civil litigation, the model litigant guidelines ‘may have broader application to the conduct of the parties in litigation and dispute resolution.’163 However, the suggestion was taken no further in that report. This possibility is also addressed in submissions received by this commission. These are discussed below.

Anecdotally, one of the persistent complaints about model litigant guidelines is that often they are not complied with and breaches are seldom sanctioned.

Ensuring compliance with the obligation primarily lies with the department or agency which has responsibility for the litigation.164 The notes to the guidelines also provide that the lawyers engaged in litigation, whether the Australian Government Solicitor, the Victorian Government Solicitor, in-house or private, ‘need to act in accordance with the obligation [themselves and to also] assist their client agency [or department] to do so.’165

At the Commonwealth level, the Office of Legal Services Coordination within the federal Attorney-General’s Department monitors compliance with the guidelines and receives and investigates complaints.166 Breaches are referred to the Attorney-General. Although the Model Litigant Guidelines
themselves do not incorporate sanctions for breaches, the Legal Services Directions make it clear that sanctions may be imposed for non-compliance.\textsuperscript{167} Moreover, agencies are required to include penalty provisions for breach of the directions in contracts with legal services providers.\textsuperscript{168} From 1 March 2006 the chief executive of each agency is required to issue an ‘annual certificate of compliance with the Legal Services Directions and to provide the [Office of Legal Services Coordination] with details of any agency breaches and remedial action taken’.\textsuperscript{169} 

The Judiciary Act 1903 (Cth) provides compliance with the Commonwealth Litigant Rules ‘is not enforceable except by, or upon the application of, the Attorney-General’.\textsuperscript{170} Further, ‘[t]he issue of non-compliance with a [rule] may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth’.\textsuperscript{171} It was noted in the Explanatory Memorandum in respect of the Judiciary Amendment Bill 1998:

Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth. For example, it is not intended that a litigant be able to argue that the Commonwealth was making a technical argument in breach of the model litigant obligation (if this were provided in the Legal Services Directions). The alleged breach could, however, be raised by the litigant with the Attorney-General or the Office of Legal Services Coordination.\textsuperscript{172}

At the Commonwealth level the government has been publicly criticised, particularly in the media, for not enforcing the guidelines for the external legal services it obtains from private law firms engaged to do its work. Former shadow Attorney-General Joe Ludwig has made several claims in relation to the previous government’s failure to enforce the guidelines, commenting that the government had been ‘dragged kicking and screaming to the table’ on the issue of enforcing the rules after [the Labor Party] had been asking questions for six years about the issue’.\textsuperscript{173} He went on to comment that this tendency revealed an ‘unwillingness by [the] government to use the legal service directions in a way that enforces compliance with them’.\textsuperscript{174}

In a recent article the Australian Financial Review reported that former Federal Attorney-General Phillip Ruddock had said the government’s emphasis was on ‘education and facilitation, rather than penalty’.\textsuperscript{175}

Mr Ruddock was further quoted as saying:

There are, however, occasions on which the government’s policy objectives can only be met by the imposition of sanctions … At the most extreme, this may involve me issuing a direction about the conduct of particular commonwealth legal work. A direction could be about any aspect of the work in question, including whether a particular legal firm is or is not permitted to perform the work, or in what manner.\textsuperscript{176}

The commission is aware, from submissions and consultations, of a number of reported instances of alleged failure on the part of the Commonwealth, or its agencies, to comply with the Model Litigant Guidelines. These cases include damages actions against the Commonwealth and others arising out of injuries allegedly suffered by children in detention centres and by survivors of the Voyager disaster.

In their analysis of the role of governments as litigators Cameron and Taylor-Sands provide instances of the more common types of situations where Commonwealth government departments and agencies have not complied with applicable model litigant guidelines and rules. Their analysis is based on a number of sources.\textsuperscript{177}

Identified problems include allegations or findings of:

- an apparently low rate of settlement of cases
- excessively adversarial behaviour
- reliance on technicalities
- incivility
- unwillingness to negotiate
- delay in compliance with court orders
- overzealous or obstructive behaviour
- failure to act in a timely manner
- failure to allow other parties to respond to adverse evidence

\begin{itemize}
\item 156 Commonwealth Model Litigant Guidelines, above n 131 [5].
\item 159 Email from Paul O’Connor, Chief Executive Officer, TAC, to the commission, 4 February 2008.
\item 160 Email from Paul O’Connor, Chief Executive Officer, TAC, to the commission, 12 April 2007.
\item 163 ALRC (2000) above n 12, [3.5].
\item 164 Commonwealth Model Litigant Guidelines, above n 131 Note 1; Victorian Model Litigant Guidelines, above n 131 Note 2.
\item 165 Ibid.
\item 167 Ibid 510.
\item 168 Ibid.
\item 169 Ibid 522.
\item 170 Judiciary Act 1903 (Cth) s 55ZG(2).
\item 171 Judiciary Act 1903 (Cth) s 55ZG(3).
\item 172 Explanatory Memorandum, Judiciary Amendment Bill 1998.
\item 173 Marcus Priest (2007) above n 11.
\item 174 Ibid. See also Cameron and Taylor-Sands (2007) above n 138, 515.
\item 175 Marcus Priest (2007) above n 11.
\item 176 Ibid.
\item 177 This includes research carried out for the Australian Law Reform Commission, a survey of responses of those involved in litigation for and against the Commonwealth, a report analysing Commonwealth legal services reforms and a review of Federal Court and AAT cases. See Cameron and Taylor-Sands (2007) above n 138, 511–14.
\end{itemize}
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- failure to provide all relevant information
- failure to act consistently
- inadequate knowledge of the law
- reluctance to settle or agree to ADR.  

According to Cameron and Taylor-Sands, in cases where the Commonwealth has been found to have breached the Model Litigant Rules, courts and tribunals have played ‘an important role in scrutinising the behaviour of the Commonwealth and educating it for future cases’. Moreover, in cases of breach the legal representatives were more often in-house government departmental lawyers or private lawyers rather than those with the Australian Government Solicitors Office, where there was more likely to be a ‘culture of compliance’. According to the authors:

*It may take some time for private lawyers to shed the traditional adversarial mindset and move from ‘adversarial advocate’ to ‘responsible lawyer’.*

Cameron and Taylor-Sands are of the view that the Commonwealth Model Litigant Rules have on the whole been reasonably effective in controlling Commonwealth litigant behaviour and that model litigant standards or codes are a valuable tool in regulating litigant behaviour.

In Victoria, the Attorney-General has responsibility for ensuring the guidelines are complied with. On a practical level, the Office of Government Legal Services within the Department of Justice ‘monitors and investigates the application of the Guidelines’ as they relate to the conduct of private sector firms providing legal services to government (‘panel firms’) and government departments, and reports to the Attorney-General.

According to the annual report of Government Legal Services for 2002–03:

*The application of the guidelines was raised by the plaintiffs and others in the context of litigation relating to the Home Borrowers Scheme administered by the Department of Human Services. After examination of the response of the defendant to the concerns raised, advice was provided to the Attorney-General that the defence of the litigation, while robust, did not breach the model litigant guidelines.*

In 2003–04, ‘no allegations concerning a possible breach of the Guidelines were made against any Panel firm or Department’. There were no references to allegations of breach or actual breach in the annual reports for Government Legal Services for 2004–05 or 2005–06. This dearth of formal complaints has been confirmed in correspondence with the Victorian Government Solicitor’s Office, which commented:

*The wholesale absence of complaints underscores our successful adherence to ML principles. We take the view that adherence to these principles is the best way to immunise our clients from judicial criticism for improper litigious behaviour.*

There have, however, been recent instances where the Transport Accident Commission has apparently acted in a manner inconsistent with its obligations under the Victorian model litigant guidelines. One such case is *Cracknell v TAC (General)*, in which Justice Bowman characterised the TAC’s behaviour as demonstrating a “‘win at all costs’ attitude” after it seemingly omitted evidence that was unfavourable to its case.

### 3.5 Duties of Witnesses, Including Expert Witnesses

As noted earlier in this chapter, it is not proposed that the overriding obligations apply to witnesses as to fact, and only certain of the obligations are intended to apply to expert witnesses.

As a general principle, the fundamental duty owed by a witness in litigation is to tell the truth. For lay witness this is the only duty.

Currently, there are no duties on lay witnesses to assist the court or the parties. They may, however, be compelled to attend court for the purpose of giving evidence.

Witnesses (including expert witnesses) are generally immune from any form of civil action in respect of evidence given by them in court. However, they may face criminal charges for perjury for giving dishonest evidence or in certain circumstances for contempt of court.
In one of the seminal Australian cases, which addresses witness immunity (but which concerned immunity of barristers),\textsuperscript{190} the majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ) said:

> From as early as the sixteenth century, a disappointed litigant could not sue those who had given evidence in the case. That is, the disappointed litigant could not seek to demonstrate that witnesses had given, or parties had suborned, perjured evidence or that witnesses or parties had conspired together to injure that litigant. Nor could the disappointed litigant seek to demonstrate that what was said by the witnesses had defamed that litigant. All such actions were precluded or answered by an absolute privilege … No action lay, or now lies, against a witness for what is said or done in court. It does not matter whether what is done is alleged to have been done negligently or even done deliberately and maliciously with the intention that it harm the person who would complain of it. The witness is immune from suit and the immunity extends to preparatory steps.\textsuperscript{191}

The rationale of this immunity is founded in public policy. In the words of Justice Starke in \textit{Cabassi v Vila},\textsuperscript{192}

> The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice.\textsuperscript{192}

Other considerations underlying the public policy argument are:

- ensuring witnesses assist in the judicial process by giving evidence without fear of the consequences
- avoiding the possibility of issues being reopened and re-litigated by dissatisfied parties.\textsuperscript{193}

The immunity extends to all witnesses (lay and expert) in respect of the evidence that they give in court and reports and statements made in preparation for giving evidence in court. In the recent case of \textit{Griffiths v Ballard}\textsuperscript{194} it was stated that:

> If the immunity is to operate, as the High Court has stated, and it is to operate consistently, then all that a witness does in court must be immune and so too all that is done by the witness out of court, which is so intimately connected with the evidence or the manner it is given, must also be immune. This is whether the act is deliberate or inadvertent.\textsuperscript{195}

A number of recent English decisions have examined the extent of the immunity of expert witnesses. In particular, the English Court of Appeal in the \textit{Meadow} case\textsuperscript{196} held that the witness immunity doctrine does not protect an expert witness from prosecution before a professional disciplinary body in respect of the evidence given in court.\textsuperscript{197} This case is discussed further below in the context of sanctions against expert witnesses.

There has been recent debate in NSW, arising out of the NSW Law Reform Commission report on expert witnesses, concerning the issue of sanctions for aberrant behaviour by such witnesses.\textsuperscript{198}

In \textit{Phillips v Symes (No 2)},\textsuperscript{199} a single judge of the English High Court held that an order for costs may be made against an expert witness where there is a gross dereliction of the witness’s duty to the court.\textsuperscript{200} The jurisdiction of the court to make such order was said to be similar to the jurisdiction of the court to make a ‘wasted costs’ order against a delinquent barrister.\textsuperscript{201} It is noteworthy that the English court had such jurisdiction even before the House of Lords declared that barristers no longer enjoyed any immunity from suit in respect of their conduct in court.\textsuperscript{202} In other words, the making of an order for costs against a delinquent barrister (who enjoyed immunity) was not seen to be inconsistent with barrister’s immunity. In most Australian jurisdictions courts have the express power to make ‘wasted costs’ orders against advocates.\textsuperscript{203}

It is quite another thing, however, to expose an expert witness to an action in damages in respect of the evidence given by them in court. This strikes at the heart of witness immunity. Presently, any such action could be summarily dismissed.\textsuperscript{204}
3.5.1 Expert Witnesses

Expert witnesses have a duty to tell the truth, in the same way as lay witnesses do. However, the situation with experts is not as straightforward. They are often in a different position to other witnesses:

First, expert witnesses of opinion are paid for their services, while witnesses of fact are not. Secondly, the former are selected by the parties from outside the factual matrix of the case, and are in practice volunteers, while the latter are bound up in the factual matrix, and are as such required to attend to assist the court as fact finder. Thirdly, the nature of expert opinion evidence lends itself to a wide range of choices of what material to select, what weight to give to that material, and how to interpret material, while evidence of fact is restricted to what the witness has seen and heard.

Expert witnesses are also ‘permitted to offer opinions to parties and to the court as to the meaning and implications of other evidence’.

Consideration of the role of expert witnesses involves a variety of matters, including:

- the nature and extent of their pre-existing or ongoing relationship with or allegiances to one or more of the parties
- their ethical obligations within their field of specialist expertise
- their contractual and financial arrangements with one or more of the litigants
- their standing, expertise and reputation within their field of specialisation
- the extent to which they have used methods of analysis or research methodologies which are generally scientifically accepted within their particular discipline and
- the nexus between relevant proved facts and expressions of expert opinion.

These factors and other considerations have the potential to bear on the quality, reliability and integrity of expert evidence. Inevitably, experts called by litigants are ‘partisan’ in the sense that a party will generally not call as a witness a person whose expert opinions are not favourable to that party’s case. Moreover, lawyers for the parties usually work closely with experts and are often directly involved in assisting in the preparation of the experts’ forensic reports and opinions.

For various reasons there has been ongoing concern, and frequent expressions of judicial disquiet, about the partisan nature and lack of objectivity of expert evidence in civil litigation. Such concerns have given rise to various attempts to formulate statements of experts’ duties and responsibilities. These transcend the mere obligation to tell the truth. Initially articulated in case law, these have been recently enshrined in rules of court, codes of conduct or practice directions. These statements do not address all aspects of expert witnesses’ duties, but focus on duties relating to the giving of opinion evidence in court.

One of the most often cited statements of the duties and responsibilities of an ethical nature of expert witnesses is found in the *Ikarian Reefer* case:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his [or her] expertise … An expert witness … should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his conclusion is based. He should not omit to consider material facts which could detract from his concluded opinion …
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert’s opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one … In cases where an expert witness who has prepared a report
could not assert the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report …

(6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side’s expert’s report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the court …

Other statements of experts’ duties are found in numerous cases.211

Codes of conduct, rules of court and practice notes in England and Australia build on common law duties and seek to further formalise and raise awareness of experts’ duties. Some codes of conduct are also promulgated by professional associations and other bodies, not just by the courts.212

In Victoria an Expert Witness Code of Conduct (‘the Victorian Code’) is part of the Supreme Court (General Civil Procedure) Rules 2005 (‘the Supreme Court Rules’).213 Those rules provide that an expert witness shall be provided with a copy of the Victorian Code by the party who intends to adduce evidence of the expert at trial.214 The expert is to acknowledge in writing having read the code and agreeing to be bound by it. Clause 1 of the Victorian Code provides that an expert witness has an overriding duty to assist the court impartially on matters relevant to the expert’s area of expertise. Clause 2 states that an expert witness is not an advocate for a party. The code also encapsulates the substance of the duties extracted from the Ikarian Reefer case as set out above. The Commercial List of the Supreme Court of Victoria Practice Note introduced in December 2004 states that the court expects expert witnesses ‘to express an opinion arrived at independently from any pressure brought to bear by or on behalf of the party engaging the expert’.215

Similar statements emphasising an expert’s paramount or overriding duty or obligation to the court appear in other Australian jurisdictions. For instance, paragraph 1 of the Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia provides:

(1) An expert witness has an overriding duty to assist the Court on matters relevant to the expert’s area of expertise;

(2) An expert witness is not an advocate for a party …;

(3) An expert witness’s paramount duty is to the Court and not to the person retaining the expert.216

In NSW, rule 31.23(1) of the Uniform Civil Procedure Rules 2005 provides that ‘an expert witness must comply with the code of conduct set out in Schedule 7’ (‘the NSW Code’). Clause 2 of the NSW Code sets out an expert’s general duty to the court in similar terms to the general duty enunciated in the Code of Practice (2003) <www.evvia.org.au/practice.html> at 4 February 2008.


214 Supreme Court (General Civil Procedure) Rules 2005, r 44.03(1)(a).


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Federal Court Guidelines. The NSW Code also provides that an expert must ‘abide by any direction of the court’ and has a ‘duty to work co-operatively with other experts’. These are relatively new inclusions in the NSW Code.

In England, an expert’s obligations appear in rule 35.3 of the Civil Procedure Rules (CPR). This was the first response to the review of the civil procedure rules relating to expert evidence undertaken as part of the Woolf report in the UK. It provides that ‘it is the duty of an expert to help the court on matters within his expertise’ and that ‘this duty overrides any obligation to the person from whom he has received instructions or by whom he is paid’. Under rule 35.10, an expert’s report ‘must comply with the requirements set out in the … practice direction’ and the expert must sign a statement that he ‘understands his duty to the court’ and that ‘he has complied with that duty’.

Part 35 of the UK rules is supplemented by a practice direction, which sets out the requirements for form and content of expert reports. This includes a separate requirement that a report be verified by a statement that the opinions are made from the expert’s own knowledge, that the expert believes them to be true and they represent the expert’s true and complete professional opinion. The next paragraph states the consequences of verifying a document containing a false statement without an honest belief in its truth, namely, the potential for proceedings for contempt of court.

The Protocol for the Instruction of Experts to give Evidence in Civil Claims drafted by the UK Civil Justice Council relates experts’ duties to the statement of the court’s overriding objective found in the rules of court. It states:

> Experts should be aware of the overriding objective that courts deal with cases justly. This includes dealing with cases proportionately, expeditiously and fairly (CPR 1.1). Experts are under an obligation to assist the court so as to enable them to deal with cases in accordance with the overriding objective.

Although statements produced by courts vary in form, they have much common substance, including statements of the main elements of experts’ duties:

- a paramount duty or an overriding obligation to the court. In the event of conflict, this duty takes precedence over any duty to a party and/or the person who engages or instructs the expert
- a duty to assist the court in matters relevant to the expert’s expertise
- a prohibition on the expert becoming an advocate for a party.

In most cases, experts are no doubt aware that they are subject to a network of professional, ethical, legal and personal obligations and duties. However, as complaints about expert witnesses and the quality of their evidence persist, the issue arises as to whether the existing statements of obligations and duties of expert witnesses are adequate to address conduct issues.

The value of statements of obligations and duties in modifying conduct has been a subject of some debate. It is recognised that such statements alone ‘will not eliminate adversarial bias’. Indeed, one submission to the commission noted that ‘sceptics would say that [codes relating to experts’ conduct have] had little effect’. Others point to statements of obligations and duties producing limited changes in behaviour such as encouraging experts to divulge slightly more information, structure their reports differently or incline them toward circumspection.

Some are more positive, suggesting:

> They provide a convenient mechanism to communicate the Courts’ views on the conduct of experts to both experts and those who retain and instruct them.

However, statements of obligations and duties are only one of a number of measures that have been introduced in recent years to counter the complaints of ‘partiality and proliferation’ of expert witnesses that were addressed, in particular, by Lord Woolf in England in the 1990s. Other measures include:

- the strengthening of case management powers
- compelling ‘the exchange of expert reports and the use of the reports as evidence in chief’
- ‘compulsory conferences between experts’
- providing for ‘hot tubbing’ and ‘the giving of evidence concurrently by more than one expert’.
On their own, statements of experts’ obligations and duties may have a limited value. However, in conjunction with other reform initiatives they clearly have a role to play, particularly insomuch as they enunciate various aspects of experts’ duties. There are, however, a number of ways in which their content and form can be improved and their effect strengthened.

First, there is an issue with the content of such statements which may affect the appreciation and understanding of the principal obligation, namely, an expert’s paramount duty or overriding obligation to the court. Statements of experts’ duties are generally silent as to the nature and content of this duty.

Second, while existing rules of court, codes of conduct and practice notes generally place emphasis on an expert’s duty to the court and are substantially similar, there is some variation between courts and different lists within courts. There are also variations in levels of case management, which can impact on the control of expert evidence. For instance, the Victorian Code makes no mention of an expert witness’s paramount duty to the court in the event of a conflict of duty with the party or person retaining the expert. This duty is explicit in statements in other jurisdictions, such as the Federal Court Guidelines and the NSW Code.221 In other Victorian jurisdictions, for example the Magistrates’ Court, there is no comprehensive statement of experts’ duties. The lack of uniformity between statements of experts’ obligations and duties has been noted in submissions, with one submission suggesting that

achieving a greater degree of uniformity would be likely to assist in the process of educating experts, and the lawyers that instruct experts, on their various roles and duties.228

Further, rules of court, codes of conduct or practice notes fall short of statutory obligations and duties. Finally, while statements of experts’ obligations and duties, including codes of conduct, suggest the potential for a regime of sanctions, they do not make explicit provision for ‘sanctioning breaches of [the obligations and duties] they define’.229

The introduction of the proposed statement of overriding obligations would provide a fundamental set of obligations and duties that all key participants in the civil justice system, including experts, would owe equally. It has the potential to have a normative affect, providing a base standard of conduct for everyone. For expert witnesses, the overriding obligations provision is not intended to replace other statements of their obligations and duties. The obligations enunciated in the new provision would be for the most part consistent with and supplementary to existing obligations. It would also address some of the inadequacies in existing statements of obligations and duties as set out above.

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217 Uniform Civil Procedure Rules 2005 (NSW) sch 7, [3].
218 Uniform Civil Procedure Rules 2005 (NSW) sch 7, [4].
221 Civil Procedure Rules 1998 (UK) (SI 1998/3132) r 35.3(1).
225 Ibid [2.4].
226 Ibid [2.5]. See also Civil Procedure Rules 1998 (SI 1998/3132) r 32.14 in relation to the consequences alluded to above.
228 Ibid [4.2].
229 This duty is not stated in the same terms in the Victorian Code, which provides that "[a] person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness." See the Supreme Court (General Civil Procedure) Rules 2005, Form 44A(1).
230 See, eg, Universal Music Australia Pty Ltd & Ors v Shanman License Holdings Ltd & Ors (2005) FCA 1242, [23]-[26].
232 Submission CP 41 (Turk/Legal and Axa Australia).
234 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing a copy of their annexed submission to NSW Law Reform Commission’s reference on expert witnesses (239).
238 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing a copy of their annexed submission to NSW Law Reform Commission’s reference on Expert Witnesses, [36].
239 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]), citing submission to NSW LRC, above n 234, [77].
Improving the Standards of Conduct of Participants in Civil Litigation

In particular, it will further define the content of an expert’s paramount duty or overriding obligation. This may serve to clarify its meaning, give it renewed emphasis and reinforce its fundamental importance.

Under the commission’s recommendations, expert witnesses, like other key participants in the civil justice system, would have an overriding statutory obligation to assist the court in the administration of justice and, in particular, to:

- act honestly
- cooperate with the parties and the court
- not engage in misleading and deceptive conduct
- use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the issues in dispute
- use reasonable endeavours to ensure that costs are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
- use reasonable endeavours to act promptly and to minimise delay
- disclose, at the earliest practicable time, the existence of documents in their possession, custody or control which they are aware of and which they consider relevant to any issue in dispute in the proceedings.

Expert witnesses would, for obvious reasons, not be subject to other specific provisions of the proposed overriding obligations relating to the making of unmeritorious claims or responses in the proceedings, and the taking of steps in the litigation or the use of reasonable endeavours to resolve the civil dispute by agreement between the parties or through alternative dispute resolution processes.

The introduction of a single statement of overriding obligations would provide consistency across all Victorian courts.

The proposed provision would also place the overriding obligations on a statutory footing. Ancillary matters could be accommodated in the rules, codes of conduct or practice notes applicable in the various courts or lists.

3.5.2 Sanctions and expert witnesses

For expert witnesses, one of the significant potential impacts of the proposed overriding obligations provision is the explicit introduction of a regime of sanctions. The commission’s proposal provides for a range of sanctions (some compensatory and some punitive) to be imposed for behaviour that does not conform with the overriding obligations.

Undesirable conduct on the part of expert witnesses ranges from instances where an expert’s evidence favours one party’s case because of a level of unconscious bias, to more extreme cases of misconduct or dishonest behaviour. It is in the extreme scenarios that the issue of sanctions arises.

The NSW Law Reform Commission in its report on expert witnesses summarised a number of possible existing sanctions for expert witnesses, depending on the nature of the conduct complained of:

- The expert witness might be criticised by the court, and might lose credibility, and thus a reduced prospect of further work as an expert witness.
- Disciplinary proceedings might be taken against the expert witness within the relevant profession.
- The court might make a costs order against the expert witness.
- The expert witness might be charged with contempt or perjury.

It is also possible that the expert’s costs could be disallowed, either between their client and another party, or between their client and themselves.

The NSW commission considered that the sanctions outlined are ‘appropriate and sufficient’ but recommended that there should be a rule or practice note requiring that expert witnesses be informed of sanctions for dishonest, inappropriate or unethical conduct. This approach is supported in some submissions to this review. It is also, to a limited extent, reflected in the Practice Direction which accompanies the English Civil Procedure Rules Part 35, and which warns experts of the consequences of verifying a document containing a false statement without an honest belief in its truth.
In December 2006 the NSW Attorney General’s Working Party on Civil Procedure responded to a range of issues raised by the NSW commission. In particular, it considered:

- whether, in fact, the power exists to make a costs order against an expert witness and the need for any amendment to the rules to facilitate such orders and
- the need for a requirement that expert witnesses be made aware of the possible sanctions that can be made against them.  

The working party concluded that the NSW commission erred in believing there is already a power in the courts to order costs against an expert witness. The Working Party’s reasoning stems from reading section 98 of the Civil Procedure Act 2005 (NSW) in conjunction with rule 42.3 of the Uniform Civil Procedure Rules 2005 (NSW). Subject to the rules, section 98 gives the court a wide discretionary power to award costs, while rule 42.3 of the limits the scope of the court’s power to award costs against a non-party.

In other jurisdictions there is the potential for the court to make a costs order against an expert. For example, in Phillips v Symes (No 2) Justice Peter Smith held that English courts may make orders for costs directly against expert witnesses who by their evidence cause significant expense to be incurred, and do so in ‘flagrant reckless disregard of [their] duties to the Court’. This would also appear to be currently the case in Victoria.

In NSW, the working party concluded that the need to use costs sanctions against experts was so rare that the benefits of making provision for such sanctions were outweighed by the risk of causing expert witnesses to withdraw their services, thus shrinking the pool of those available to give evidence. In light of this, it concluded that there was no need to amend the rules to provide for costs sanctions or to ‘wave’ sanctions ‘under the nose of prospective witnesses’. The concern expressed by the NSW commission about sanctions or an overly punitive approach acting as a deterrent to prospective expert witnesses is repeated in submissions to this review. One submission reported that:

> There are already many anecdotal examples of parties having difficulty in obtaining appropriately qualified expert witnesses, and any significant increase in such obligations would serve to potentially further reduce the pool of such qualified professionals prepared to act as expert witnesses.

Another stated that it is already often difficult to find suitable experts, particularly as they are commonly required to comment adversely on the conduct of their peers.

Although mindful of such concerns the commission is not persuaded that the availability of costs or other sanctions is likely to deter persons from agreeing to give expert evidence. Moreover, as a safeguard against inappropriate, frivolous or vexatious resort to sanctions and with a view to placing constraints on ‘satellite litigation’, the commission is recommending that applications for sanctions should require leave of the court. The sanctions would not be operative until 12 months after the proposed overriding obligations come into force.

Despite the approach recently adopted in NSW, the commission is of the view that expert witnesses should not be placed in a privileged position compared with other key participants in civil litigation before Victorian courts. We believe it is desirable to have a regime of sanctions which is uniformly applicable to those who transgress the requisite standards.

With regard to costs orders, as Justice Peter Smith said in Phillips v Symes (No 2):

> It seems to me that in the administration of justice, especially, in light of the clearly defined duties now enshrined in CPR Pt 35 [and CPR PD 35], it would be quite wrong of the court to remove from itself the power to make a costs order in appropriate circumstances against an expert who, by his evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the court.

The Supreme Court’s submission supported an explicit statement of the availability of costs sanctions against experts. It recommended the introduction of a range of procedures in dealing with expert evidence, particularly in complex cases in specialist lists where expert evidence forms a significant aspect of the case. In relation to costs the court submitted:

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240 NSWLR (2005) above n 231, [9.75].
241 Ibid [9.76].
242 Submissions CP 39 (Mallesons Stephen Jaques), CP 33 (Victorian Bar).
243 Ministry of Justice (UK), above n 224.
245 Ibid [30].
246 See the Uniform Civil Procedure Rules 2005 (NSW) r 42.3 and Ibid.
248 Under s 51 of the Supreme Court Act 1987 (c 54).
249 Phillips v Symes (No 2) [2004] EWHC 2330 (Ch) [95]. See also Civil Justice Council (2005) above n 227, [4.7].
250 See Neil Williams, Civil Procedure—Victoria, vol 1 (at January 2008) (LexisNexis Butterworths) I 44.01.27, I 63.02.35, I 63.02.50 and the cases referred to therein. In the Supreme Court of Victoria, s 24(1) of the Supreme Court Act 1986 provides that costs are ‘in the discretion of the Court’, which has ‘full power to determine by whom and to what extent the costs are to be paid’.
252 Submission CP 25 (Institute of Chartered Accountants in Australia [Forensic Accounting Special Interest Group]).
253 Submission CP 49 (Mallesons Stephen Jaques).
254 (2004) EWHC 2330 (Ch) [95].
Experts who breach the Code may be personally liable for the costs of their evidence. The Rule would resemble r 63.23, and reference to it be incorporated into the Code of Conduct.255

There are also issues about the adequacy of the other existing potential sanctions against expert witnesses, particularly with regard to compensating the opposing party or parties for the consequences of inappropriate expert conduct. In Phillips v Symes (No 2),256 Justice Peter Smith pointed to the available sanctions other than costs (such as censure, committal for contempt or perjury, reporting to professional bodies, etc.) as not being either effective or anything other than blunt instruments. The proper sanction is the ability to compensate a person who has suffered loss by reason of that evidence. This flows from Myers v Elman[257] … applied to experts. I do not accept that experts will, by reason of this potential exposure, be inhibited from fulfilling their duties. That is a cri de coeur often made by professionals, but I cannot believe that an expert would be deterred, because a costs order might be made against him in the event that his evidence is given recklessly in flagrant disregard for his duties. The high level of proof required to establish the breach cannot be ignored. The floodgates argument failed as regards lawyers[258] and is often the court of last resort.259

The availability of sanctions against expert witnesses in the context of disciplinary proceedings has recently been considered in England in the high profile case of Meadow v General Medical Council.260 The case raised the question of whether the doctrine of witness immunity provides protection for expert witnesses against professional misconduct proceedings.

The case involved an appeal by the General Medical Council (GMC) from a judgment of Justice Collins, who had an appeal by Professor Meadow, a retired eminent paediatrician, against a finding by the GMC that he was guilty of serious professional misconduct and ordered that his name be removed from the register.261 The alleged misconduct arose in connection with expert evidence given by Professor Meadow in the criminal prosecution of Sally Clark for the alleged murder of her two infant sons. Professor Meadow’s evidence was used to refute the proposition that Mrs Clark’s children had died from sudden infant death syndrome.262 Mrs Clark was initially convicted and sentenced to more than 15 years jail but an appeal was ultimately successful and her convictions were quashed.

At first instance, Justice Collins held that Professor Meadow was, as an extension of the immunity from suit enjoyed by witnesses in legal proceedings, entitled to immunity from disciplinary proceedings in respect of his evidence in Mrs Clark’s trial.263 However, on appeal, the Court of Appeal held unanimously that witness immunity did not extend to disciplinary proceedings. In his judgment, Sir Anthony Clarke MR said:

It would to my mind be very striking, not to say astonishing, if the way in which an expert gave evidence or the content of that evidence showed that he was not fit to practise in a particular discipline, but the [Fitness to Practise Panel] could not consider it because the expert was immune from disciplinary proceedings by some absolute common law immunity.

That would especially be so if the only evidence of unfitness to practise derived from evidence given in court.264

Disciplinary proceedings have a deterrent quality as well as being a mechanism intended to protect the public. As Sir Anthony Clarke MR continued:

The threat of FTP [fitness to practise] proceedings is in the public interest because it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the professions from which expert witnesses come. As stated earlier, the purpose of the FTP proceedings is the protection of the public.265

In the end result, a majority of the Court of Appeal (Sir Anthony Clarke MR dissenting) held that Professor Meadow was not guilty of serious professional misconduct and dismissed the appeal on this basis.
In Australia, the issue of whether there is immunity from disciplinary proceedings in respect of alleged unprofessional conduct arising out of evidence given in court by an expert witness was considered by the Full Court of the South Australian Supreme Court in *James v Medical Board of South Australia and Keogh*.266

In NSW it has recently been reported that a prominent psychiatrist has been reprimanded by the NSW Medical Board after its professional standards committee disagreed with an expert opinion given in a criminal case.267

Apart from possible disciplinary proceedings applicable to their particular specialist field, at present expert witnesses, like any witness, may be subject to proceedings for perjury, contempt of court or perverting the course of justice.

The commission is not persuaded that the availability of these alternative sanctions, or the traditional rationale for witness immunity, should prevent its recommended obligations and sanctions applying to expert witnesses. However, the commission is of the view that the overriding objectives and sanctions for noncompliance should not be applicable to nonexpert witnesses. Moreover, we propose that all applications for sanctions or other remedies for contravention of the overriding obligations, including against experts, should require leave of the court.

### 3.6 DUTIES OF CORPORATIONS

Corporations are often parties to civil litigation. Considering the existing duties of corporations as litigants raises the question of whether the application of the proposed statutory overriding obligations to corporations in the conduct of civil litigation may be inconsistent with other statutory provisions or the general law applicable to corporations. This issue may also arise in relation to insurers and litigation funders (inssofar as they are corporations). This is discussed below.

Submissions to the commission were divided on whether the obligations and sanctions should be applicable to corporations. For example, Telstra expressed the view that there is ‘adequate regulation of the conduct of corporations through the Corporations Law and associated regulations’.268 However, the specific application of the provisions to corporations was not explicitly addressed in many submissions.

Although there may be scope for argument, the commission is not persuaded that the statutory or other duties imposed on corporations generally and directors in particular, including the obligation to act in the best interests of the company,269 are necessarily inconsistent with the overriding obligations, which the commission recommends should be imposed on participants in civil litigation before Victorian courts.270

The Corporations Act 2001 (Cth) is not intended to exclude or limit the concurrent law of a state,271 and in particular is not intended to exclude or limit the concurrent operation of a law of a state that imposes additional obligations or liabilities on a company.272 If there is inconsistency between the proposed overriding obligations and provisions of the Corporations Act 2001 (Cth), the Victorian Parliament could pass legislation declaring a matter to be an excluded matter so that relevant inconsistent provisions of the corporations legislation did not apply to that matter.273

The policy issue of whether the proposed overriding obligations should be applicable to corporations as litigants is discussed above and also referred to below in the analyses of the submissions received by the commission.

### 3.7 DUTIES OF INSURERS AND LITIGATION FUNDERS

As noted above, the proposed overriding obligations would not only apply to litigants and lawyers, but also to litigation funders and insurers to the extent that such entities or persons exercise any direct or indirect control or influence over the conduct of any party in a civil proceeding.

They would not be applicable to a litigation funder or an insurer that merely provided financial support or indemnity to a party to civil proceedings. Whether direct or indirect control or influence over the conduct of a party exists is a question of fact to be determined in the circumstances of each case. In most instances this is unlikely to be problematic.

If a litigation funder or insurer is incorporated then the issues discussed above in relation to the imposition of overriding obligations on corporations may arise.

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255 Submission CP 58 (Supreme Court of Victoria).
256 [2004] EWHC 2330 (Ch).
257 [1940] AC 282.
258 Referring to, in England, the abolition of immunity from civil action conferred on barristers with respect to work in court in the case of *Arthur J S Hall & Co (A firm) v Simons* [2002] 1 AC 615.
259 Phillips v Symes (No 2) [2004] EWHC 2330 (Ch).
262 *Meadow v General Medical Council* [2007] QB 462, 471.
265 *Meadow v General Medical Council* [2007] QB 462, 484.
266 (2006) SASC 267 (Bebby, Gray and Anderson J). The expert evidence included evidence arising out of a post mortem given at a criminal trial, which led to a conviction for murder. The decision was handed down before the English Court of Appeal decision in the *Meadow* case. The SA Full Court also rejected the argument that witness immunity precluded disciplinary proceedings in respect of unprofessional conduct based (in this case, in part) on expert evidence given in court.
267 [2007] QB 462, 484.
269 See, eg, *Corporations Act 2001* (Cth) s 181.
270 The two “laws” are directed at different subject matter and the relevant Commonwealth law does not intend to “cover the field” of the proposed state legislation; see, eg, *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).
271 Corporations Act 2001 (Cth) s 5E(1).
272 Corporations Act 2001 (Cth) s 5E(2) (a)(ii). Thus, eg, as Ford notes: “state environmental and industrial laws, which impose additional duties and liabilities upon directors and officers, and special industry laws which limit maximum shareholdings in companies such as gas or electricity utilities or gambling casinos, are laws permitted to operate concurrently with the Corporations Act”. *Butterworths, Ford’s Principles of Corporation Law*, vol 1 (at 25 February 2008) ‘3 Regulating Companies’ [3.101].
273 As contemplated by Corporations Act 2001 (Cth) s 5F.

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Although litigation funders and insurers are not presently directly regulated in relation to the conduct of litigation, depending on their legal status they may be subject to other legislative and regulatory requirements which may be relevant to the conduct of litigation and which may give rise to possible inconsistency between such requirements and the proposed overriding obligations.

Apart from provisions in the *Corporations Act 2001* (Cth) applicable to companies, referred to above, publicly listed companies have additional obligations, including those arising out of the ASX listing rules. As well, insurers are subject to the provisions of the *Insurance Act 1973* (Cth) and the *Insurance Contracts Act 1984* (Cth), and litigation funders may be regulated under Chapter 7 of the *Corporations Act 2001* (Cth) as financial services providers.

Proposals for the regulation of litigation funding arrangements are presently under consideration by the Standing Committee of Attorneys General. The Council of Chief Justices is also examining the issue of litigation funding. The commission does not believe that the proposed overriding obligations are necessarily inconsistent with or incompatible with present or proposed legislative or regulatory provisions applicable to litigation funders or insurers.

Because litigation funders and insurers often exercise direct or indirect influence or control over the forensic conduct of parties that they are funding or indemnifying in civil proceedings the commission is of the view that they should be subject to the same overriding obligations as litigants and lawyers. Thus, all relevant participants in litigation would be subject to the same standards and sanctions. In Chapter 6 we outline our proposals for the disclosure of litigation funding and insurance arrangements.

### 4. SPECIFIC OBLIGATIONS

Each of the specific obligations incorporated in the proposed overriding obligations is discussed below.

#### 4.1 THE OBLIGATION TO ACT HONESTLY

Each of the key participants would at all times be required to act honestly.

At present legal practitioners are obliged to act honestly. Professional conduct rules and rules of conduct applicable to solicitors and barristers in Victoria impose such an obligation. For example, rule 1.1 of the *Professional Conduct and Practice Rules 2005* provides that: ‘A practitioner [solicitor] must, in the course of engaging in legal practice, act honestly.’ Similar provisions are contained in the *Victorian Bar Rules of Conduct 2005*. Dishonest conduct, including by parties and others engaged in the conduct of litigation, may give rise to various legal remedies and have disciplinary consequences for lawyers.

#### 4.2 THE REQUIREMENT OF MERIT

The overriding obligations incorporate a prohibition on making or responding to any claim, or assisting in the making of or response to a claim, where a reasonable person would be of the belief that the claim or response (as appropriate) is frivolous, vexatious, for a collateral purpose or without merit.

The term ‘claim’ is intended to include not just the formal pleaded causes of action or defences, but also interlocutory applications and responses to such applications.

The use of a ‘reasonable person’ test is for the purpose of having an objective standard, rather than one of subjective intent or belief of the relevant participant.

At present there are various rules of court and other legal principles dealing with frivolous and vexatious proceedings and abuse of the court’s process.

In some jurisdictions in Australia, legal and/or ethical obligations have been imposed on lawyers requiring that they be satisfied as to the merit of a client’s case. In Victoria, the *Legal Profession Act 2004* provides that ‘if a conditional costs agreement relates to a litigious matter “the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely.”’ In NSW, lawyers are prohibited from providing legal services in connection with damages claims or defences which do not have merit. There may be costs and disciplinary consequences.
At the Commonwealth level, the *Migration Act 1958* prohibits persons from encouraging litigants to commence or pursue migration litigation if it has no reasonable prospect of success.279 The prohibition applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.280 There is a prohibition on lawyers filing documents to commence migration litigation unless they certify in writing that there are reasonable grounds for believing that the litigation has a reasonable prospect of success.281 Costs orders may be made against lawyers and others engaged in unmeritorious migration proceedings and appeals.282

Similarly, the *Therapeutic Goods Act 1989* (Cth) provides that a person proposing to bring patent infringement proceedings must certify, before the date of commencement of proceedings, that the proposed proceedings are “to be commenced in good faith ... have reasonable prospects of success” and “will be conducted without unreasonable delay”.283 Proceedings have reasonable prospects of success if the person or persons had reasonable grounds, on the basis of what they knew or ought to have known for believing that they would be entitled to be granted final relief by the court against the other party for patent infringement, for believing that each of the claims of infringement is valid, and the proceedings are not otherwise vexatious or unreasonably pursued.284 If the certificate is ‘false or misleading in a material particular’, or the person ‘breaches an undertaking given in the certificate’, pecuniary penalties of up to $10 million payable to the Commonwealth may be imposed on the person.285

The *Model Rules of Professional Conduct* of the American Bar Association provide that a lawyer ‘shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so that is not frivolous’.286 This does not prevent a ‘good faith argument for an extension, modification or reversal of existing law’.287 According to the commentary on the rule a claim or defence is not frivolous ‘merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery’.288

The commission is of the view that the proposed requirement of legal merit is consistent with an increasing array of ethical and legal provisions governing the conduct of civil litigation and is of critical importance.

4.3 THE OBLIGATION TO ONLY TAKE STEPS TO RESOLVE OR DETERMINE THE DISPUTE

The proposed overriding obligations include a prohibition on the taking of any step in the proceeding in connection with a claim or response to a claim, or assisting in the taking of any step or response to a step, unless the participant reasonably believes that such step is reasonably necessary to facilitate the resolution or determination of the proceeding.

It is clearly desirable for civil proceedings to be conducted in a manner that avoids or minimises undue delay, expense and technicality. A number of civil procedural reforms or legislative provisions289 applicable to particular types of proceedings seek to achieve this through imposing overriding obligations with this objective.

This element of the commission’s proposals seeks to focus the attention of participants in civil litigation on the steps reasonably required to facilitate resolution of the issues in dispute and to curtail the taking of steps that do not satisfy this requirement.

4.4 THE OBLIGATION TO COOPERATE

In its earlier draft proposal in respect of overriding obligations the commission proposed that there should be an obligation to act ‘in good faith’. At the time, the commission conceded that it had a concern about the vagueness of such an obligation. As noted above, ‘good faith’ obligations arise in a number of legal contexts at present.290 However, a number of submissions raised concerns about the utility of such an obligation. For example, the Victorian Bar noted that one academic commentator has defined good faith as ‘a concept which means different things to different people in different moods at different times and in different places’.291

Following further consultations, particularly with the Supreme Court, the commission resolved to replace the obligation to act in good faith with an obligation to ‘cooperate’. Under the present proposal, relevant participants in civil litigation would have a duty to cooperate with the parties and the court in connection with the conduct of the proceeding.
Statutory or other civil procedural obligations on parties to cooperate in relation to disclosure of documents or information and the conduct of civil proceedings have become increasingly common.\textsuperscript{292} Civil procedure expert Neil Andrews has noted the ‘interesting suggestion’ that procedural systems should recognise a duty of cooperation between disputants, even within the pre-action phase.\textsuperscript{293} This appears to have developed as part of the Dutch law of civil procedure. He also notes that English pre-action protocols rest on a principle of cooperation between disputants and lawyers, and in England this principle is now accepted by courts and, through practice directions, operates independently of the strict letter on individual pre-action protocols.

In Australia and other jurisdictions in recent years, various professional practices and procedures have been developed in the area of ‘collaborative law’, particularly in family law. This represents a major shift away from traditional adversarial methods for the resolution of disputes.

Collaborative law has been described variously as:

- a diplomatic process of joint problem solving\textsuperscript{294}
- an interest-based negotiation model\textsuperscript{295}
- emphasising ‘client empowerment’\textsuperscript{296}
- a non-adversarial dispute resolution process facilitated by lawyers with the objective of achieving an ethical and enduring settlement for the clients.\textsuperscript{297}

Collaborative law has at its core a number of key features:

- Clients and lawyers sign a contract agreeing to negotiate in ‘good faith’ to resolve a dispute without resort to litigation.
- If the dispute is unable to be resolved by negotiation the lawyers acting for all parties will withdraw and not act for their clients in any litigation proceedings.
- The negotiation process consists of a number of four-way meetings involving the parties and their lawyers together.
- Advice is to be given with the aim of achieving a fair process and just outcomes for both parties.
- The process promotes ongoing communication.
- One objective is to ensure that costs are not incurred unreasonably.\textsuperscript{298}

The process relies on trust and cooperation between lawyers, in particular as disclosure of all documents and information is not subject to the control of court procedures.

At present, a number of professional conduct rules governing the legal profession fall short of imposing an affirmative obligation to cooperate with other practitioners or parties. Duties are often limited to a requirement to be courteous and to refrain from offensive or provocative language or conduct.\textsuperscript{299} However, civility is a less demanding requirement than cooperation.

4.5 THE OBLIGATION NOT TO MISLEAD OR DECEIVE

The commission’s proposed overriding obligations impose a duty on relevant participants in civil litigation not to:

(i) engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or
(ii) knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive.

Under the existing law, a number of legal, equitable and ethical obligations apply to various participants in civil litigation. Context influences the nature and extent of these obligations.\textsuperscript{300} Such obligations include those arising out of tort law in respect of deceit and negligent misrepresentations, and statutory provisions relating to false or misleading and deceptive conduct. Section 52 of the Trade Practices Act 1974 (Cth) provides:

\textit{A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.}
Section 52 of the Trade Practices Act is directed to corporations; the counterpart legislation in Victoria (and other states) is directed at the conduct of individuals. Section 9 (1) of the Fair Trading Act 1999 (Vic) provides:

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.301

Considering that these provisions or other state legislative equivalents302 are among the most litigated statutory provisions in Australia, it is perhaps surprising that there are relatively few cases involving lawyers. Clearly, there are circumstances where a lawyer may be liable for engaging in conduct which is misleading or deceptive.303 However, the legal requirement that such conduct be in ‘trade or commerce’ limits the extent of such liability:

Deals between lawyers and clients have not, in the usual case, been construed as being in trade or commerce, and plaintiffs who resort to the contrary assumption, it has been said, ‘may well be in trouble’.304

Lawyers may also be liable for aiding and abetting contraventions by their clients.305 The legislation extends liability to ‘any person involved in the contravention’, which includes a person who ‘has aided, abetted, counselled or procured the contravention’, or ‘has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention’. Whether conduct is misleading and deceptive for the purposes of section 52 of the Trade Practices Act involves an objective test and does not require proof of intention or knowledge.306 Mere inadvertence is sufficient. It has been said ‘Honest blundering or carelessness by solicitors may be subject to s 52 liability.’307

The misconception can be caused through oral or written statements, actions or conduct. Failure to act and, in some circumstances, silence may also amount to misleading conduct. In particular, ‘conduct’ is defined to include refraining from acting.308 Silence will be caught by this definition only if it is deliberate or ‘otherwise than inadvertent’.309

Additionally, as noted above, there is a range of professional obligations that specifically apply to lawyers.

The Model Rules of Professional Conduct and Practice of the Law Council of Australia 2002 contain various prohibitions on misleading and deceptive conduct. For example, rule 18.1 states:

A practitioner must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

Rule 28 states:

A practitioner must not, in any communication with another person on behalf of a client:

(1) represent to that person that anything is true which the practitioner knows, or reasonably believes, is untrue; or

(2) make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the practitioner’s client.

Identical rules are incorporated in the Professional Conduct and Practice Rules 2005 in Victoria. Such rules also require that steps be taken to correct inadvertent false statements:

18.2 A practitioner must take all necessary steps to correct any false statement unknowingly made by the practitioner to the opponent as soon as possible after the practitioner becomes aware that the statement was false.

18.3 A practitioner does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the practitioner by the opponent.

Relevant provisions of the Victorian Bar Practice Rules are:

Rule 19: A barrister must not knowingly make a misleading statement to a court on any matter.

Rule 20: A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware the statement was misleading.

292 See, eg, ‘Workers’ Compensation and Rehabilitation Act 2002’ (Qld) s 279.


298 Ibid.


300 See, eg, Legal Services Commissioner v Mullins [2006] UPT 012, 27.

301 Similar to the Commonwealth legislation, there are also provisions dealing with unconscionable conduct and false representations.

302 For example s 42 Fair Trading Act 1987 (NSW) and corresponding legislation in other jurisdictions.


305 See Trade Practices Act 1974 (Cth) ss 82, 75B; and Fair Trading Act 1999 ss 145, 159.


308 See Trade Practices Act 1974 (Cth) s 42(1) and Fair Trading Act 1999 s 3.

309 Trade Practices Act 1974 (Cth) s 42(1)(c).
Rule 21: A barrister will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.

Rule 9 defines ‘court’ to include arbitrations and mediations.

Rule 50: A barrister must not knowingly make a false statement to the opponent concerning the facts of, evidence in support of or law applicable to the client’s case.

Rule 51: A barrister must take all necessary steps to correct any false statement of the kind referred to in Rule 50 unknowingly made by the barrister to the opponent as soon as possible after the barrister becomes aware that the statement was false.

The Legal Profession Act 2004 provides that legal profession rules are binding on Australian legal practitioners, incorporated legal practices, multidisciplinary partnerships and locally registered foreign lawyers.310

In Queensland rule 325 of the Uniform Civil Procedure Rules 1999 provides that the ‘parties must act reasonably and genuinely in … mediation’. Rule 23 of the Rules of the Bar Association of Queensland provides that ‘a barrister must not knowingly make a misleading statement to a court on any matter’.311 ‘Court’ is defined to include a ‘mediation’.312

At the risk of overgeneralisation, the ethical rules governing the legal profession are largely directed at ‘knowingly’ false or misleading statements whereas the general statutory provisions in relation to misleading and deceptive conduct contained in Commonwealth and Victorian legislation give rise to civil liability based on objective standards.

In the United States the American Bar Association’s Model Rules of Professional Conduct include:

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. 313

The comment on Rule 4.1 states:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.314

(emphasis added)

Interestingly, these provisions appear to countenance a different standard in negotiation compared with the conduct of litigation.
The Law Society of Alberta Code of Professional Conduct is an example of a code specifically directed to the lawyer in the role as negotiator. Chapter 11, titled ‘The lawyer as negotiator’, commences with a statement of general principle:

When acting as negotiator, a lawyer has a duty to seek a resolution in accordance with the client’s instructions, subject to limitations imposed by law or professional ethics.\(^{315}\)

The rules which follow state:

1. A lawyer must not lie to or mislead an opposing party.

2. If a lawyer becomes aware during the course of a negotiation that:

   (a) the lawyer has inadvertently misled an opposing party, or
   (b) the client, or someone allied with the client or the client’s matter, has misled an opposing party, intentionally or otherwise, or
   (c) the lawyer or the client, or someone allied with the client or the client’s matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,

   then, (subject to confidentiality …) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.

3. (a) A lawyer must not make a settlement offer on behalf of a client except on the client’s instructions.
   (b) A lawyer must promptly and fully communicate all settlement offers to the client.

4. A lawyer must not negotiate an agreement that the lawyer knows to be criminal, fraudulent or unconscionable.

5. When negotiating with an opposing party who is not represented by counsel, a lawyer must:
   (a) advise the party that the lawyer is acting only for the lawyer’s client and is not representing that party; and
   (b) advise the party to retain independent counsel.\(^{316}\)

The rules are elaborated on in extensive commentary. For rule 1, which concerns lying and misleading, the commentary states in part:

The process of negotiation often involves representations as to the extent of a lawyer’s authority. For example, a client may authorize a lawyer to settle an action for no more than $100,000.00. The lawyer may not pretend a lack of authority to offer more than $50,000.00 or $75,000.00 or any other amount under $100,000.00. In response to a direct question about the monetary limits of the lawyer’s authority, the alternatives of the lawyer are to respond truthfully or simply decline to answer. The lawyer is not entitled to offer a response intended or likely to create a misleading impression, which would be tantamount to lying.\(^{317}\)

On the concept of ‘misleading’, particularly in relation to rule 2, the commentary states:

The concept of ‘misleading’ includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c) of Rule #2, the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.\(^{318}\)

The commission’s proposed prohibition on misleading and deceptive conduct in connection with civil litigation is consistent with the generally high standards expected of lawyers and provisions of the general law, including statutory provisions applicable to those engaged in ‘trade or commerce’.


\(^{312}\) Ibid r 15.

\(^{313}\) American Bar Association (2007) above n 286, r 4.1: Truthfulness In Statements To Others.

\(^{314}\) Ibid.


\(^{316}\) Ibid.

\(^{317}\) Ibid, Commentary on ch 11, r 1.
4.6 THE OBLIGATION TO USE REASONABLE ENDEAVOURS TO RESOLVE THE DISPUTE

The proposed overriding obligations include an obligation to use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes.

Various civil procedural reforms and legislative provisions applicable to particular types of cases seek to directly or indirectly facilitate the resolution of civil disputes by agreement between the parties. Indirect methods include the express conferment of powers on courts to require litigants to engage in ADR processes, usually mediation. Direct methods include statutory obligations on parties to endeavour to resolve claims.319

Courts are increasingly involved in active case management and various forms of ADR are increasingly used and promoted to facilitate the resolution of disputes. Most recently, as noted above, collaborative lawyering agreements are gaining prominence as a new form of ADR, particularly in family law disputes.

Some rules of professional conduct applicable to the legal profession incorporate provisions relating to ADR. For example, in Victoria the Professional Conduct and Practice Rules 2005 provide that:

A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation.320

However, the duty, ‘where appropriate’, to advise of ADR alternatives is clearly different from the proposed affirmative obligation to use reasonable endeavours to resolve the dispute.

There are of course numerous situations where it may be necessary or appropriate for civil litigation to proceed to a final adjudication of the merits. This includes test cases, public interest litigation and commercial and other cases where there is utility in obtaining a judgment of the court. However, these situations are the exception rather than the norm. The commission is of the view that most parties in most civil litigation prefer a resolution of the dispute rather than a trial with the consequential risks, delays and costs.

4.7 THE OBLIGATION TO NARROW THE ISSUES IN DISPUTE

The proposed overriding obligations include an obligation to use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute.

It is an explicit objective of most formal and informal provisions relating to the judicial management of litigation to achieve a narrowing of the ‘real issues’ in dispute. The commission’s proposed overriding obligations impose this requirement directly on the litigants, lawyers and other relevant participants in civil litigation.

At present, some professional conduct rules applicable to the legal profession explicitly provide for the exercise of forensic judgment to confine any hearing to those issues considered by the lawyer to be the real issues in dispute.321

Also, various legislative provisions or rules of court require parties to endeavour to clarify or narrow the issues in dispute.322

4.8 THE OBLIGATION TO MINIMISE COSTS

The proposed overriding obligations include a duty to use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceedings are minimised and proportionate to the complexity or importance of the issues and the amount in dispute.

Cost minimisation and ‘proportionality’ are key elements of recent civil justice procedural reforms in a number of jurisdictions.

Some legislative reforms have focused on the role of the courts; others have imposed obligations on parties. An example of the latter is the Workers’ Compensation and Rehabilitation Act 2003 (Qld), which imposes overriding obligations on parties ‘to avoid undue delay, expense and technicality’,323 with provision for sanctions for noncompliance. Similar provisions are found in other legislation.324
4.9 THE OBLIGATION TO MINIMISE DELAY

The proposed overriding obligations include a requirement that relevant participants in civil litigation use reasonable endeavours to act promptly and to minimise delay.

In various contexts and in numerous ways civil procedural reforms and legislative provisions applicable to certain types of proceedings seek to impose overriding obligations intended to achieve the expeditious conduct of proceedings.

At present, various professional conduct rules applicable to the legal profession impose a general obligation to complete legal work with expedition, but such provisions usually do not explicitly apply to the conduct of litigation.

4.10 THE OBLIGATION OF DISCLOSURE

The proposed overriding obligations include a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.

This is not intended to require duplicate disclosure of documents which have already been disclosed under pre-action disclosure obligations or pre-existing orders for preliminary or other discovery.

The provision does not seek to put a specific time frame on disclosure other than the requirement that this be done ‘at the earliest practicable time’.

The obligation does not require a party to search for, review or actually disclose the documents themselves. It is intended to facilitate disclosure of the existence of documents which a party is already aware of and only insofar as the party has already considered such documents relevant to any issue in dispute in the proceedings.

The existence of documents which are protected from disclosure, including on the grounds of privilege, is not required to be disclosed.

The Commission is of the view that early disclosure of the existence of material documents is an important means of facilitating resolution of disputes, of narrowing issues which may be required to be litigated and in reducing costs and delays. In many instances it is to be hoped that such material documents will already have been disclosed, prior to the commencement of proceedings, through compliance with pre-action protocol requirements. Such pre-action protocols should also facilitate early identification of the real issues in dispute between the parties.

The approach adopted by the Commission is consistent with a number of other recent civil justice reforms, both in Australia and in other countries. For example, as discussed in Chapter 6, in a number of Australian jurisdictions there are now requirements for the mandatory disclosure of certain documents prior to, or at the time of, commencement of legal proceedings.

In some jurisdictions early disclosure obligations are considerably more onerous than those proposed by the commission. For example, in the United States rule 26(a)(1)(A) of the Federal Rules of Civil Procedure provides that a party must, without awaiting a discovery request, provide to the other

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defences, unless solely for impeachment, identifying the subjects of the information;

(ii) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defences, unless solely for impeachment;

(iii) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

318 Ibid, Commentary on ch 11, r 2.
319 See, eg, Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 281.
320 Professional Conduct and Practice Rules 2005, r 12.3; see also Law Council (2002) above n 88, r 12.3.
321 See, eg, Victorian Bar (2005) above n 91, r 17 (a).
322 See, eg, Victorian Civil and Administrative Tribunal Act 1998 s 83; Dust Diseases Tribunal Regulation 2001 (NSW) reg 37; District Court Rules 2005 (WA) r 403; Rules of the Supreme Court 1971 (WA) O 29A r 11; Rules of the Supreme Court 1971 (WA) O 31A r 10(4); Federal Court Rules 1979 (Cth) O 10 r 1(2).
323 Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 274(1).
324 See eg, s 4(2)(e) Personal Injuries Proceedings Act 2002 (Qld), which provides that one of the purposes of the legislation is to ‘minimise the cost of claims’.
325 See, eg, Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 274(2).
326 See eg, Professional Conduct and Practice Rules 2005, r 1.2.
(iv) for inspection and copying under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.\textsuperscript{327}

Initial disclosure under these provisions is required to be made at or within 14 days after the conference provided for by rule 26(f) unless a different time is set by agreement or court order.\textsuperscript{328} Where a party objects at a conference that such disclosure is not appropriate in the circumstances of the action and states the objection in the rule 26(f) discovery plan, the court may then determine what disclosure is to be made and set a time for disclosure.\textsuperscript{329}

A party is required to provide such initial disclosure ‘based on the information then reasonably available to it’ and is ‘not excused from [making disclosure] because it has not fully [completed its investigation of the case] or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures’.\textsuperscript{330} There are additional disclosure obligations in respect of expert witnesses\textsuperscript{331} and evidence that a party may present at trial.\textsuperscript{332}

Parties are required to confer, within a specified time frame, to consider the ‘nature and basis of their claims and the possibilities for promptly settling or resolving the case, [to] make or arrange for the [initial disclosure] required by Rule 26(a)(1), [to] discuss any issues about preserving discoverable information and…develop a proposed discovery plan’.\textsuperscript{333} Lawyers and unrepresented parties are obligated to attempt in good faith to agree on the proposed discovery plan.\textsuperscript{334}

Although in part modelled on the initial disclosure obligations in the US \textit{Federal Rules of Civil Procedure}, the disclosure component of the commission’s proposed overriding obligations is far less onerous. It is intended to only require disclosure of the existence of documents already identified by a party as relevant to the issues in dispute in the proceedings. The commission’s further proposals for document discovery and disclosure are dealt with in Chapter 6.

Although not preliminary discovery in the sense in which that term is normally used, the commission’s proposal in respect of early disclosure of the existence of documents considered by a party to be relevant to the issues in dispute will accelerate disclosure of such information, provide the parties with an early opportunity to consider the strength of the other party’s position and help to facilitate settlement.

\textbf{5. APPLICATION TO ANCILLARY NEGOTIATIONS AND DISPUTE RESOLUTION PROCESSES}

The commission’s proposed overriding objectives would apply to any ADR process undertaken in relation to any civil proceeding pending in a Victorian court. This is not intended to be limited to ‘formal’ processes such as mediation, but would also include informal processes, including negotiation. A number of professional practice ethical rules and legislation in various jurisdictions already make explicit reference to conduct in ADR processes, including mediation and negotiation.

In \textit{Managing Justice} the ALRC suggested that professional practice rules should provide more guidance for lawyers on expected standards of conduct in negotiations in civil matters. In particular, it was recommended that a standard of ‘good faith’ should be required where lawyers are negotiating on behalf of a client.\textsuperscript{335} Although the commission earlier considered the adoption of an obligation to act in good faith as part of the overriding obligations, following consultations this was abandoned in favour of the present obligation to ‘cooperate’.

Professional rules relating to honesty are applicable equally to negotiations and mediations as they are to other aspects of legal practice. However, in some circumstances lawyers may not regard the standards applicable to the conduct of litigation as being equally applicable to the more informal processes of mediation and negotiation. Also, some professional practice ethical rules explicitly accept a differing standard in the context of negotiations and mediation.

The commission is of the view that the same high standards proposed for the conduct of civil litigation should apply to any ADR process undertaken in relation to any civil proceedings pending in a Victorian court. The commission does not accept that lesser standards of conduct should be permissible in the context of mediation or in the conduct of negotiations.
5.1 CONFIDENTIAL AND ‘WITHOUT PREJUDICE’ ADR PROCESSES

Given that the commission’s proposed overriding obligations would apply to ADR processes such as mediation and negotiation (when conducted in relation to civil proceedings pending in a Victorian court) it is necessary to consider the fact that the conduct of participants in such processes is often subject to confidentiality agreements or obligations and on a ‘without prejudice’ basis. As noted below, this is often protected by statute, subject to exceptions.

The without prejudice nature of such conduct is usually understood to mean that for the purpose of the legal adjudication of the dispute, the conduct in issue cannot be invoked for forensic advantage. However, it does not necessarily follow that such conduct may not be relevant for other purposes, including costs sanctions and disciplinary proceedings. In fact, as noted below, certain legislative provisions expressly provide that without prejudice conduct may be taken into account by the court (after the resolution of the dispute) on the issue of costs. The conduct of the legal practitioner which gave rise to disciplinary proceedings in the recent Queensland case referred to above, took place in the context of an otherwise confidential mediation.

It has been suggested that the confidentiality of what happens in negotiations and mediations should be preserved. In this event conduct in contravention of the overriding obligations would not be able to be disclosed, either in connection with costs or in any ancillary proceeding relating to sanctions or other remedies.

The alternative is to allow for exceptions to the protection of confidentiality in certain circumstances. However, the prospect of conduct in settlement negotiations or a mediation being scrutinised by the court raises a range of issues. For example:

- it may inhibit the process of settlement negotiations or mediation in that parties may be reluctant to expose themselves to the risk of subsequent disclosure
- it creates the potential for re-ventilating in court what happened during the course of settlement negotiations or a mediation.
- it raises the possibility of mediators being called to give evidence about what transpired at a mediation.

There are clearly a number of public policy arguments that favour protecting the confidentiality of communications made during settlement negotiations and mediations. These include the view that the parties should be encouraged to settle disputes without fear that information provided may be subsequently used against them. Hence the settlement or mediation process is generally considered subject to confidentiality requirements at common law, in statute and in private contractual agreements.

However, communications in the course of settlement negotiations or mediations are not protected by absolute confidentiality constraints. There are various exceptions and limitations to the protection. These are discussed below.

5.1.1 Current sources of confidentiality

Common law

At common law, ‘without prejudice’ communications (oral or written) made with the bona fide intention of settling a dispute are inadmissible in court proceedings about the same subject matter without the consent of the parties.

In Field v Commissioner for Railways (NSW) the High Court said:

“The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhindered. This form of privilege, however, is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied
admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of the negotiations or what is said in the course of them as evidence by way of admission. For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner by the use of the words ‘without prejudice’ and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words. 339

It is notable that the Court drew the distinction between, on the one hand, admissions by words or conduct made in negotiations that are protected from subsequent admission in evidence and, on the other, objective facts ascertained in negotiations that are not protected.

This issue was more recently considered in a mediation context in the Supreme Court of NSW in the case of TEN v Westpac. 340 Justice MacDougall said:

I think that the analogy between without prejudice discussions and mediation is compelling. I do not think that the relative formality of the latter process affords a relevant ground of distinction. Nor do I think that the perceived need for greater frankness in the latter process does so. There is no compulsion on a party to disclose information for the purposes of mediation. If a party wishes to protect itself from the consequences of disclosure, it is open to it to seek to do this by an appropriately drafted mediation agreement. If the parties do not do so, I do not think that, on policy grounds, the Court should do it for them … In any event … I would conclude that the relevant privilege requires a distinction to be drawn between communications (written or oral) and the information contained in them … Any attempt to extend the common law privilege from statements or documents to information contained in them would raise well nigh insuperable problems. [emphasis added]

In this case Justice MacDougall highlighted the limitations of the without prejudice privilege and the potential for the subsequent disclosure of factual material unless there is a mediation agreement precluding this.

Another apparent example of an exception to the without prejudice privilege is statements made in the course of negotiations that amount to misleading and deceptive conduct within the meaning of section 52 of the Trade Practices Act 1974 (Cth). In Quad Consulting Pty Ltd v David R Bleakley & Assoc Justice Hill observed:

It seems to me that if, in the course of ‘without prejudice’ negotiations, a party to those negotiations engages in conduct which is misleading or deceptive or likely to mislead or deceive contrary to s 52 of the Trade Practices Act and as a result the other party to the negotiations relying, for example, upon the misleading or deceptive conduct suffers loss, proof of the negotiations should not be rendered impossible by the ‘without prejudice’ rule. There is, in such a case, no longer the same subject matter in dispute between the parties as was in dispute at the time of the negotiations. A fortiori where the party suffering damage was not at all a party to the negotiation. The public policy to be found in Pt V of the Trade Practices Act is not to be rendered nugatory by permitting a party to hide behind the fact that his or her conduct, which is misleading or deceptive conduct, occurred during the course of ‘without prejudice’ negotiations. A party cannot, with impunity, engage in misleading or deceptive conduct resulting in loss to another under the cover of ‘without prejudice’ negotiations. 341

This position is now reflected in section 131(2)(i) of the Uniform Evidence Act, which is discussed below.

**Statutory requirements of confidentiality**

Section 21L of the Evidence Act 1958 provides for confidentiality of mediation conferences. Evidence of anything said or of admissions or agreements made at, or documents prepared for the purpose of, a conference with a mediator with a dispute settlement centre is not admissible in any court or legal proceedings, except with the consent of all persons present at the conference. Section 21M imposes
confidentiality constraints on mediators, members, employees of and persons working with or for dispute settlement centres. Section 21L exempts mediators and others working with or for dispute settlement centres from liability for things done in good faith for the purpose of a conference with a mediator.

Section 131(1) of the Uniform Evidence Act (which is soon to come into force in Victoria) provides that evidence is not to be adduced of a communication made in connection with an attempt to negotiate a settlement of a dispute, including communications made with third parties. The section applies only to civil matters, and not to negotiations concerning criminal charges.

In the joint Uniform Evidence Act report, the Australian, NSW and Victorian Law Reform Commissions considered whether mediations fall within the scope of section 131. They concluded that the section applies to communications in mediations, other than court-ordered mediations, which are typically covered by the legislation of the court.

A number of exceptions to the confidentiality constraints in section 131(1) are set out in sub-section (2), including:

- where the parties consent
- where the substance of the evidence has been disclosed
- where the communication included a statement to the effect that it was not to be treated as confidential
- where the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute
- where the communication is relevant to determining liability for costs
- where making the communication affects a right of a person
- where the communication was made in furtherance of the commission of a fraud or an offence.

These exceptions have been developed along similar lines to those established under the common law and have been said to apply to communications which are of a criminal or tortious nature, or are capable of affecting rights and liabilities (such as—acts of bankruptcy, defamatory statements, illegal threats, the election of alternative courses of action), and open offers of settlement.

Notably, the exception in section 131(2)(i) concerns the making of a communication affecting a right of a person. Possible examples are:

- defamatory statements
- acts of bankruptcy
- threats (constituting a tort or a crime)
- misleading and deceptive conduct contrary to section 52 of the Trade Practices Act 1974 (Cth) or the state equivalent
- the exercise of an option
- a contractual offer
- conduct amounting to an election.

Such a right has been held to be an existing right, not a right coming into existence on the making of a communication.

The exception concerning a communication relevant to determining liability for costs has been considered in numerous cases. In The Silver Fox Pty Ltd v Lenard's Pty Ltd (No 3) the applicants successfully tendered affidavit evidence of a communication at a mediation to justify their application for costs of the proceeding. This was despite the fact that the mediation agreement imposed obligations of confidentiality. When considering sub-section 131(1)(h), which provides the relevant exception to section 131(1), Justice Mansfield observed:

Section 131(1), subject to its exceptions, gives effect to the policy of ensuring the course of negotiations—whether private or by mediation—are not adduced into evidence for the purpose of influencing the outcome on the primary matters in issue. Clearly, it is in the public interest that negotiations to explore resolution of proceedings should not
be inhibited by the risk of such negotiations influencing the outcome on those primary issues. It is equally in the public interest that negotiations should be conducted genuinely and realistically. The effect of s 131(2)(h) is to expose that issue to inspection when costs issues only are to be resolved. There is no apparent public interest in permitting a party to avoid such exposure by imposing terms upon the communication, whether by the use of the expression ‘without prejudice’ or by a mediation agreement.

Statutory confidentiality in mediations

Some federal and state statutes provide that mediations in certain contexts are confidential, that evidence of anything said or done or of any admission made in the mediation is not admissible in court proceedings, and/or that documents prepared for the purposes of, or in the course of, or pursuant to the mediation are also inadmissible.

For example, section 53A of the Act 1976 (Cth) provides for referral of the proceedings in the court, or any part of them or any matter arising out of them, to mediation (or arbitration). Section 53B provides:

Evidence of anything said, or of any admission made, at a conference conducted by a mediator in the course of mediating anything referred under section 53A is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence. [Emphasis added]

Section 53C relevantly provides that a mediator has, in mediating anything referred under section 53A, the same protection and immunity as a judge has in performing the functions of a judge. Therefore, in a court-ordered mediation in the Federal Court the mediator is immune from actions for negligence and is not a compellable witness.

In a further example, in NSW, section 15 of the Farm Debt Mediation Act (1994), in its original form, provided:

(1) Evidence of anything said or admitted during a mediation session and a document prepared for the purposes of, in the course of or pursuant to, a mediation session are not admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

(2) In this section, mediation session includes any steps taken in the course of making arrangements for a mediation session or in the course of the follow-up of a mediation session.

Section 16 of the Act provides a penalty for disclosure of information obtained in a mediation session, with defined exceptions.

In a number of cases issues have arisen as to the terms of agreements purportedly reached at mediations or in connection with the enforcement or rectification of agreements purportedly reached. Following a review of the legislation the Act was amended by the Farm Debt Mediation Amendment Act 2002 (NSW) with effect from 3 March 2003. The amendments included the introduction of section 15(3), which excludes from the confidentiality constraints heads of agreement, any contract, deed, mortgage or other instrument entered into as a result of or pursuant to heads of agreement and a summary of the mediation (under section 18A).

The rationale for the confidentiality provisions was reviewed in a recent decision by Justice Bergin of the NSW Supreme Court:

Gain v Commonwealth Bank of Australia was a case in which settlement was not achieved at mediation. Gleeson CJ observed that the provisions of s 15 were to encourage candid discussions at mediations and remove the risk of having what is said at mediations used against participants, ‘if the mediation does not result in settlement’ (at 256). The policy identified by Gleeson CJ is particularly directed to the protection of participants in an unsuccessful mediation from having disclosures or admissions made during the mediation used against them when the dispute is litigated. The need for such a policy in relation to successfully mediated disputes is not as clear. However, parties who have reached a mediated settlement may, for various reasons, wish to keep their negotiations confidential.
confidential, for instance to protect sensitive commercial information.

Matters peripheral to the dispute between the parties may also be the subject of discussion at the mediation. Indeed, matters relevant to disputes between a participant to the mediation and some third party may be the subject of discussion. It may even be the case that statements adverse to the participant’s interests in that other dispute may be disclosed. There may be all sorts of things discussed at mediation, both innocuous and damaging that the parties may wish to keep confidential. If parties to the mediation were cognisant of the prospects of disclosure of their discussions should they succeed in reaching agreement at the mediation, the candid nature of the discussions would probably be compromised. This may lead to fewer settlements being achieved or more mediations being adjourned, in both instances adding to the additional costs of the parties.351

Although these policy considerations are important there are also other relevant policy considerations. The availability of sanctions for dishonest or misleading and deceptive conduct in the course of mediations or negotiations and the absence of statutory confidentiality constraints in respect of such conduct may have a beneficial impact on the behaviour of participants and the integrity of the processes.

In Victoria limitations are imposed on the admissibility of evidence of anything said or done at a court-ordered mediation, unless the parties agree.352 For example section 24A of the Supreme Court Act 1986 provides:

Where the court refers a proceeding or any part of a proceeding to mediation, unless all the parties who attend the mediation agree otherwise in writing, no evidence shall be admitted at the hearing of the proceedings of anything said or done by any person at the mediation. [Emphasis added]

It is notable that this section is narrower than the Federal Court provision (and the NSW provisions). For instance, the Supreme Court Act only makes the evidence of what is said or done at the mediation inadmissible at the hearing of the proceeding, while the Federal Court of Australia Act 1976 (and the NSW provisions) makes it inadmissible in any court or other proceedings. Arguably, therefore, evidence arising out of a Supreme Court ordered mediation would not be afforded statutory protection in another related proceeding or in an action arising out of the conduct of the participants in the negotiations or mediation. This could include an action against the mediator,353 the legal representatives or the parties.

In NSW the broad confidentiality provisions previously found in the Supreme Court Act 1970 (NSW) have been superseded by the provisions of the Civil Procedure Act 2005 (NSW), which are also broad.354

349 The Silver Fox Pty Ltd v Lenard’s Pty Ltd (No 3) [2004] FCA 1570, [36].


351 Hurworth Nominees Pty Ltd v ANZ Banking Group Limited [2006] NSWSC 1278 at [33]–[34].

352 Supreme Court Act 1986 s 24A; Supreme Court (General Civil Procedure) Rules 2005 r 50.07(6); County Court Act 1958 s 47B; County Court Rules of Procedure in Civil Proceedings 1999 r 50.07(7); Magistrates’ Court Act 1989 s 108(2); Magistrates’ Court Civil Procedure Rules 1999 rr 22.02, 22A.08; see also Evidence Act 1958 ss 21K–21M, referred to above.

353 For instance, for negligence as in Tapoohi v Levenberg (No 2) [2003] VSC 410. In court-referred mediations s 27A of the Supreme Court Act 1986 confers immunity from suit on mediators.

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Contractual confidentiality

Commonly, parties to private mediations (that is, mediations other than those ordered by the court) attempt to bind all participants to contractual confidentiality provisions to prevent use and disclosure of communications and information obtained during a mediation.

5.1.2 Current exceptions to confidentiality obligation

As noted above, some statutory provisions provide for limitations on confidentiality and/or exceptions to inadmissibility where there is consent of the parties. Other statutory exceptions to confidentiality relate to allegations of fraud, information about criminal offences and competing disclosure obligations under Commonwealth or state legislation.

5.1.3 Proposed ‘overriding obligations’ and obstacles to establishing breach

In the context of negotiations and mediations, the proposed statutory overriding obligations—to act honestly, to cooperate and not to engage in conduct which would mislead or deceive—in large measure restate obligations found to some extent in various existing sources such as ethical rules, statutes and rules of court.

The imposition of standards of behaviour specific to mediations is not entirely novel. There are already a number of statutory provisions that require parties to participate in ‘good faith’ in a mediation. For example, section 27 of the Civil Procedure Act 2005 (NSW) provides that it is the duty of each party to proceedings that have been referred to mediation to participate, in good faith, in the mediation. Section 11 of the Farm Debt Mediation Act 1994 (NSW) also provides that the parties are required to ‘mediate in good faith’ or take part in ‘mediation in good faith’.

Although neither of these Acts imposes sanctions for breach of the duty of good faith, provisions in other legislation do. Where such legislation prohibits admission of anything said or done or any admission made at a mediation, there would appear to be considerable difficulties in establishing breach of the duty. This obstacle was noted in Rajski v Tectran Corp Pty Ltd by Justice Palmer, in considering provisions of the Supreme Court Act 1970 (NSW):

There is a problem, I concede, with applying s 110(4) and s 110(5) so as to exclude evidence as to what transpired at a mediation in all proceedings other than as provided in subs (6). S 110L provides that it is the duty of each party to proceedings referred to mediation under s 110K to participate in good faith in the mediation. Pt 7B of the Act does not prescribe what remedy is afforded either to the Court or to a party where another party to the mediation deliberately disobeys the statutory injunction to participate in good faith. Is the Court to be powerless to enforce the section? If not, by what evidentiary means is the Court to ascertain whether there has been deliberate disobedience? Is the Court to regard s 110L as having no consequences, punitive or otherwise, if it is flouted?

These are questions which, according to the argument which has taken place before me today, are not yet decided by authority. Nothing is said about these questions in Pt 7B of the Act or in the Supreme Court Rules which throws any light upon possible answers.

A similar problem could arise in relation to the proposed ‘overriding obligation’ provisions. It may be necessary to rely on evidence of what had been said or done in negotiations or at mediation for the purpose of establishing breach.

5.1.4 Alternative options

The issue of confidentiality in ADR processes may be dealt with in a number of different ways. Different considerations may arise depending on whether the mediation is ordered by the court or is conducted privately pursuant to an agreement between the parties.

One alternative is to make no change to the existing confidentiality and admissibility provisions. In the event of proceedings for alleged breach of the overriding obligations, attempts to adduce evidence of what had transpired in settlement negotiations or at a mediation would be subject to the constraints and exceptions that currently exist at common law or pursuant to statute, including the provisions of the Uniform Evidence Act which are soon to come into force in Victoria. Court-ordered mediations would be subject to the terms of the relevant statutory provisions and court rules. Private mediations would also be subject to the terms of any confidentiality agreement.
A second alternative would be to provide for a list of exceptions to the general rules governing admissibility for the purpose of proceedings for alleged breach of the overriding obligations.

A third alternative would be to confer on the court discretion to allow evidence for the purpose of proceedings for alleged contraventions of the overriding obligations, to overcome any legal constraints on the admissibility of evidence in such proceedings.

The commission is of the view that evidence of alleged contraventions of the overriding obligations in the context of ADR processes, including mediation and negotiation, should be admissible in any proceedings arising out of such alleged contraventions. Similarly, evidence should be admissible of conduct in breach of the overriding obligations where this is relevant to orders for costs in the proceedings where the matter proceeds to judgment because of a failure of the parties to reach agreement.

There would appear to be little purpose in providing for standards of conduct and remedies for breach if evidence to establish the contravention is not admissible. The fact that leave of the court would be required before proceedings for sanctions or other remedies could be instituted in connection with alleged contravention of the overriding obligations provides one safeguard.

6. RESPONSES TO THE COMMISSION’S PROPOSALS

The commission’s draft proposals in relation to overriding obligations were incorporated in Exposure Draft 1. Individuals and organisations were divided in their responses. Divergent views were also expressed in consultations with judicial officers, members of the profession and consumer and business organisations. This divergence of viewpoint was reflected in both general views about the desirability of introducing such overriding obligations and in comments on particular elements of the draft proposals.

Following further consideration, and in light of the responses received through submissions and consultations, the draft proposals were significantly modified, as noted in various parts of this chapter. The test for determining legal merit has been changed; a duty to ‘cooperate’ has been substituted for the duty to act in good faith; applications for sanctions for alleged breach of the overriding obligations have been made subject to obtaining leave of the court and it is presently proposed that the sanctions should not come into force until 12 months after the overriding provisions become operative. The provisions are not intended to apply to fact witnesses and only a limited number of the obligations required before proceedings for sanctions or other remedies could be instituted in connection with alleged contravention of the overriding obligations provides one safeguard.

6.1 SUPPORT FOR THE PROPOSALS

General support for the proposed overriding obligations was based on a number of arguments, including those summarised below.

- The provision clarifies duties and provides a statement of their overriding effect. This will reduce the potential for conflict between existing obligations, including duties to clients and to the court.
- At present, codes of conduct, practice rules and responsibilities and obligations are diffuse. The other obligations on participants in litigation are ad hoc and located in various sources. It is desirable to bring the obligations of fundamental importance together in a single statement and to give it prominence.
- It is desirable to create a statutory statement of the paramount duty to the court. A statement of this type in statutory form does not currently exist in Victoria. The proposed provision would restate the duty (which already exists for some participants, such as lawyers and expert witnesses) and would also clarify the meaning of the duty, give it renewed emphasis and reinforce its fundamental importance. It would also extend the duty to other participants in the civil justice system who would then have a clear duty to the administration of justice and, in particular, to conduct litigation according to high standards.
- A number of the proposed duties do not currently exist, certainly not in statutory form.

355 See, eg, Supreme Court Act 1986 s 24A (referred to above).
356 See eg, Land and Environment Court Act 1979 (NSW) s 61E (now repealed); Duct Diseases Tribunal Regulation 2001 (NSW) reg 35(2), 35(3); Water Act 1912 (NSW) s 170B(5); District Court Rules 2005 (WA) r 40(3); Civil Procedure Act 2005 (NSW) s 170(9); Uniform Civil Procedure Rules 1999 (Qld) r 525; Workers Rehabilitation and Compensation Act 1987 (Qld) s 42K; Family Law Act 1975 (Cth) s 60; Family Law Rules 2004 (Cth) sch 1, pt 1, r 1(1), Administrative Appeals Tribunal Act 1975 (Cth) s 34A(5); Workplace Relations Act 1996 (Cth) s 696(6).
357 See, eg, Duct Diseases Tribunal Regulation 2001 (NSW) reg 46(3)—the Tribunal may decline to include costs of mediation in an award of costs if the Tribunal is satisfied that the party in whose favour the award is to be made did not participate in good faith in the mediation; Uniform Civil Procedure Rules 1999 (Qld) r 331(1)—the mediator’s certificate may indicate that a party did not attend the mediation; Rules of the Supreme Court 1971 (WA) O 29A r 11(5)(b), O 29 v 32(0)—a mediator may report to the court on failure by a party to cooperate in a mediation conference, but the report is not disclosed to the trial judge except for the purposes of determining costs; District Court of Queensland Act 1967 (Qld) s 98(2)—if a party impedes the ADR process, the court may impose sanctions including, for example—(a) ordering that any claim for relief by the defaulting party is stayed until further order; and (b) taking the party’s action into account when awarding costs in the proceeding or in another related proceeding; Family Law Rules 2004 (Cth) sch 1 pt 1 r 1(3)—failure to make a genuine effort to resolve disputes at ADR may attract cost penalties or other sanctions, and r 23(1) provides that the court can consider parties’ participation in ADR when making general orders as to costs and case management.
358 [2003] NSWSC 476.
359 Which preceded relevant provisions of the Civil Procedure Act 2005 (NSW).
360 [2003] NSWSC 476, [20]–[21].
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• A code of conduct alone will not necessarily improve standards of behaviour, but it may provide a normative framework that will underpin conduct. For instance, in its submission the Supreme Court suggested:

The moral force of defined standards and obligations serves a useful purpose in and of itself. The current obligations, even when not accompanied by sanctions for breach, guide participants in their behaviour and provide a concrete basis for argument by parties and action by the Court. For example, Rule 1.14 has operated to guide the Court in making orders for the conduct of trials. 361

• Using the government model litigant guidelines as a template, it is desirable to expand such a concept to all participants in the civil justice system. At present the Victorian model litigant guidelines do not have the force of law and there is no clearly defined mechanism for enforcement. The proposed provisions would address both the expansion of a code of conduct and the introduction of a regime of sanctions to ensure effectiveness.

• A statement of obligations may be useful as an educative tool. For instance, it may help participants understand what is expected of them. It may also assist the court in the management of the behaviour of those involved in litigation. Lawyers may rely on it to provide an explanation to clients of acceptable and unacceptable conduct.

• Because lawyers’ duties are legal and ethical, the enforcement system is spread between the courts and professional and regulatory bodies. Where breach of an obligation relates to a particular matter before the court, enforcement by the court would be more direct and less expensive than other methods of imposing sanctions.

• The application of a single statement of overriding obligations would also provide consistency across all Victorian courts. The overriding obligations provision would apply across the board—whatever the court or list, whatever the level of case management. It would address issues of lack of uniformity across courts, providing one statement of general application and fundamental importance that would apply to all experts, as well as other participants.

• The proposal will help to combat persistent complaints about conduct in litigation.

In general terms, there was significant support for the proposed overriding obligations from judicial officers, numerous law firms, Australia’s largest commercial litigation funder, and representatives of various organisations, including consumer bodies, community legal centres and public interest organisations.

6.2 OPPOSITION TO THE PROPOSALS

General arguments against the adoption of overriding obligations include those summarised below. A number of these arguments were directed at aspects of the draft proposals, which have subsequently been modified by the commission in the light of submissions and consultations.

• It is unworkable and inappropriate to have a single set of obligations which are owed between each of the participants. Rather it is preferable to have a smaller number of obligations imposed on all participants, for example a paramount duty to the court, a duty to act cooperatively and a duty not to mislead or deceive. The remaining duties could be imposed on the parties and the lawyers.

• Imposing duties which would be owed to the opposing side in litigation would be a controversial step.

• The obligations are potentially in conflict with existing obligations. For instance, there could be inconsistency between the obligation to make full and early disclosure and lawyers’ duty to act in accordance with the instructions of their clients.

• A ‘one size fits all’ approach is inappropriate. It imposes obligations with serious consequences on everyone, including participants who may have little experience of the civil justice system or who may be unrepresented and have little opportunity for education about the process.
• The provision may lead to collateral litigation, with time spent debating the meaning of the obligations. Similar problems have arisen with Rule 11 of the US Federal Rules of Civil Procedure.

• The provision may pose problems for practical implementation. For instance, how is it proposed that enforcement proceedings would be brought? Would it be a summary procedure or would a separate proceeding be required? Who would ‘prosecute’? How would evidence be gathered?

• It is not clear how these obligations sit with the adversarial nature of litigation and with the obligations to look after interests of the client. If everyone has an overriding obligation to the court, is required to act truthfully and reasonably, to draw the court’s attention to all relevant factual information, legal authorities and statutes and to make no attempt to mislead the court, would this still allow for the presentation of a case in the most favourable light?

There was a general lack of support for the proposed overriding obligations from several business groups or organisations, a number of law firms and the Law Institute of Victoria. Some submissions raised issues about particular aspects of the proposal.

• The Law Institute of Victoria was of the view that ‘existing legal obligations as well as commercial realities and ethical duties to ensure costs and delays are minimised are sufficient’.362 A number of other commentators contended that the proposals were unnecessary because of the existence of present standards of honesty, overriding duties to the court, regulatory regimes applicable to practitioners and the existing powers of the court to manage litigation and to deal with frivolous or vexatious proceedings.

• Victoria Legal Aid was not convinced of the necessity for the proposal and raised concerns about the potential to add to the ‘administrative burden of litigation and increase costs of justice’.363

• The Victorian Bar raised concern about various aspects of the earlier draft proposals and was of the view that there was no need to go beyond the NSW approach of introducing a statutory overriding purpose ‘to remind parties of their duties in the conduct of litigation’.364

• In a number of submissions community legal centres and public interest bodies raised concerns at the prospect of abuse of the sanctions provisions. Some submissions addressed particular problems that might be experienced by self-represented litigants, those from disadvantaged and marginalised communities and from culturally and linguistically diverse backgrounds. This was said to give rise to the potential for abuse by more powerful parties.

• Although supporting the proposal, law firm Maurice Blackburn suggested that the ‘proposals should provide, and the courts must be vigilant to ensure, that [the proposed changes] do not increase the ability of large, determined litigants to obfuscate, delay and increase expense’.365

• While generally supportive of a proposal that imposes obligations on participants in litigation, the Supreme Court of Victoria noted that:

  Imposing a regime of sanctions for breach of obligations in addition to those which already exist within legislation and Court rules, introduces a number of difficulties, such as investigation in order to attribute fault, satellite litigation, conflicts of interest, interpretation and interaction with existing powers and professional conduct regimes. 366

• Law firm Clayton Utz expressed the view that the imposition of overriding obligations represents a statement of principle with which few responsible persons would take issue but which … presents serious challenges in terms of both (a) the law’s ability to control human behaviour … while still maintaining individual personal responsibility for outcomes; and (b) preserving the inherently adversarial nature of the common law dispute resolution process.367

362 Submission CP 18 (Law Institute of Victoria).
363 Submission ED1 25 (Victoria Legal Aid).
364 Submission ED1 24 (Victorian Bar).
365 Submission ED2 19 (Maurice Blackburn).
366 Submission CP 58 (Supreme Court of Victoria).
367 Submission ED1 18 (Clayton Utz).
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6.3 SPECIFIC ASPECTS OF THE OVERRIDING OBLIGATIONS

In a number of submissions, and in the course of consultations, discussion focused on particular aspects of the proposed overriding obligations. A number of the issues raised are discussed below.

6.3.1 Witness immunity

Concern was expressed that if the imposition of obligations by participants in civil litigation to each other carries with it the right of participants to take private action for breach of those obligations, witness immunity (and the substantial public policy reasons underlying it) will be imperilled. As noted above, the commission has decided that the overriding obligations would not apply to fact witnesses and that only some of the obligations should be applicable to expert witnesses.

6.3.2 Regulatory burden

A number of submissions raised concern about the additional regulatory burden that the overriding obligations would impose on participants in civil litigation. The commission is of the view that having a set of clearly defined high standards uniformly applicable to key participants in the civil litigation process in publicly funded courts is a more desirable policy objective than the current patchwork of statutory, common law, ethical and other provisions, which are of restricted application and which provide for only limited if any enforcement mechanisms by the courts themselves.

It is accepted that some of the obligations sought to be imposed by the overriding obligations overlap with or duplicate other legal or ethical duties imposed on some participants. However, the regulatory regime proposed by the commission seeks to resolve existing tensions between duties, particularly those imposed on the legal profession, by providing for overriding obligations to the administration of justice which seek to give greater force to what is currently generally accepted as a paramount duty to the court.

6.3.3 Satellite litigation and sanctions

The commission is very mindful of concerns raised about the undesirability of satellite litigation, ie, litigation arising out of the conduct of litigation, and about the potential scope for abuse of the remedies and sanctions. Accordingly, the final proposals were modified to introduce a requirement to obtain leave of the court before applications for sanctions can be pursued and to introduce a gap of 12 months between the date of the obligations coming into force and the availability of mechanisms for enforcement.

6.3.4 Existing regulation of lawyers

Some commentators raised issues about the relationship between the proposed overriding obligations and existing provisions regulating the conduct of legal practitioners. For example, the Legal Services Commissioner raised concerns that the reform proposals ‘may result in systems which overlap and hence … create confusion for consumers and lawyers alike’.

These and other concerns gives rise to various issues, which are addressed below and in other parts of this chapter.

As already noted, a number of the proposed overriding obligations are in fact based on legislative provisions applicable to the legal profession in various Australian jurisdictions. However, some of these provisions (eg, obligations to be satisfied about merit) are limited to particular types of litigation or particular types of fee arrangements. The commission is of the view that there is little policy justification for confining such obligations to particular types of fee arrangements (eg, where it is proposed to charge a success fee) or to limited categories of litigation (eg, damages actions or migration cases). The commission considers that a set of uniform standards applicable to all types of litigation is more desirable and less confusing than the existing patchwork of provisions.

Many recent civil procedural reforms in Australia and elsewhere have sought to have an impact on the conduct and practices of the legal profession and parties to litigation. Unlike some other reforms, which seek to impose direct obligations on the courts and corresponding but indirect obligations on lawyers and parties to assist the court, the commission is of the view that it is preferable to impose such obligations directly on the key participants.

The commission’s proposals are also directed at conduct which is at present not the subject of high normative standards, and at key participants who are outside the ambit of obligations which are limited to lawyers. It is considered that the articulation of high standards will have important behavioural and cultural consequences for the conduct of civil litigation.
As noted in various parts of this report, the existing regulatory provisions applicable to lawyers are problematic in a number of respects. There is tension between the obligation to act in a client’s best interest and the obligation to the court. In the case of incorporated legal practices listed on the stock exchange there is potential for conflict between the obligations of lawyers conducting the legal practice and the obligations owed by the business to shareholders. In-house lawyers employed by organisations or entities which may themselves be litigants may be subject to competing demands in their roles at litigators and as employees. Moreover, the desire of most private legal practices to maximise profitability, including in the conduct of litigation, gives rise to potential incompatibility with the desires of clients and the demands of professional obligations owed as officers of the court. The overriding obligations proposed by the commission seek, at least in proceedings in publicly funded courts, to unequivocally give primacy to the administration of justice and to require high standards of conduct by all key participants in the civil litigation process.

State and federal governments have seen fit to superimpose similar ‘model conduct’ obligations on both government and private lawyers engaged in the conduct of civil litigation on behalf of governments and their instrumentalities and agencies.

It is to be hoped that there will not be a proliferation of satellite proceedings and professional conduct complaints arising out of alleged contraventions of the overriding obligations. Satellite proceedings should be curtailed by the imposition of a leave requirement, but the commission has not considered it appropriate to incorporate a provision dealing with whether noncompliance on the part of lawyers may amount to either unsatisfactory professional conduct or professional misconduct. This would be a matter for determination by relevant regulatory bodies, principally the Legal Services Commissioner. However, in its submission the commercial litigation funder, IMF Australia, contended that compliance with the overriding obligations by lawyers ought to be considered as a professional conduct obligation and that any breach should be professional misconduct. According to IMF, ‘[t]o do otherwise would seriously limit the benefits available from the reform’.

6.3.5 Impact on those exercising control or influence over litigation

A number of submissions raised particular issues about the application of the proposed statutory obligations to insurers, litigation funders and others exercising control or influence over the conduct of parties to civil litigation.

Australia’s largest commercial litigation funder, IMF Australia, supported the application of the overriding obligations to litigation funders, insurers and other persons who have influence over the conduct of parties in litigation. IMF contended that in order to make funders and insurers accountable to the court for their overriding obligations they should be obliged to inform the court, at the commencement of the proceedings, of their identity, the fact that they will be funding the litigation and the terms of that funding. The issue of disclosure is dealt with further in Chapter 6 of this report.

Law firm Clayton Utz raised the question of whether the overriding obligations (and in particular the previously proposed obligation to act in good faith) may conflict with the implied contractual duty of good faith which insurers have to their policyholders. It contended that insurers, like litigation funders, are ‘effectively professional litigants who generally have a detailed understanding of the process and have no economic incentive to protract it, or to take points which lack merit and are ultimately likely to be determined against them’. It suggested that disputes are likely to arise between the insurer and the insured in areas such as product liability and professional negligence, given the insurer’s desire to adopt a pragmatic approach to litigation and settle cases rather than allow the insured to have their day in court. In contrast, the insured may have an ‘economic and reputational interest invested in the outcome of the litigation, over and above damages or costs exposure’, which would be met by the insurer. The submission suggested that in product liability class actions in particular the intransigent defendant is more likely to be a corporation, which may or may not have insurance to call on, but which ‘faces a substantial risk over and above what may be covered by its policies and which also has an interest, which may or may not ultimately be justified, in vindicating its product’.

The explicit recognition of such divergent economic and commercial interests among corporate and other litigants and their insurers, and the fact that such interests have a bearing on the conduct of litigation, may support the commission’s view that a uniform set of high standards should apply to all

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368 Submission ED1 10 (Legal Services Commissioner).
369 See eg, Law Institute (2005) above n 89.
370 By way of contrast section 347 of the Legal Profession Act 2004 (NSW) provides that the provision of legal services by a law practice without reasonable prospects of success is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice. This is limited to the provision of legal services on a claim or defence of a claim for damages pursuant to section 345 of the same Act.
371 Submission ED1 8 (IMF Australia Ltd).
372 Submission CP 57 (IMF Australia Ltd).
373 Submission ED1 18 (Clayton Utz). See also Submission ED1 21 (Insurance Council of Australia), which raised concern that the creation of a statutory duty of good faith may create a ‘US style situation where the tort of good faith is used not as a tool to ensure participants adhere to standards of conduct, but rather as an additional cause of action creating more litigation and cost’.
374 Submission ED1 18 (Clayton Utz).
375 Ibid.
376 Ibid.
key participants in civil litigation. Concern about potential conflict between competing duties of ‘good faith’ is no longer directly an issue as the commission has proposed that an obligation to cooperate should replace the previously proposed good faith provision. The proposed obligations are likely to support rather than hinder those who wish to pursue a ‘pragmatic’ approach and settle rather than litigate cases to their conclusion. The provisions incorporate explicit obligations to use reasonable endeavours to resolve the dispute by agreement between the parties and to limit the issues in dispute.

A further issue in relation to insurance was raised by Clayton Utz. A substantial amount of Australia’s liability insurance is obtained offshore. The firm suggested that (despite the application of the Insurance Contracts Act 1984 (Cth) and the Insurance Act 1973 (Cth) to certain insurers) if the Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 became law, insurers ‘will not have a presence in the Australian jurisdiction and their actual decisions may not be amenable to scrutiny by the court’. The proposed application of sanctions to such insurers ‘would be likely to provoke the involvement of foreign lawyers and, if anything, diminish rather than enhance the prospects of cases being [settled]’. In the longer term this may ‘lead to a reduction in the amount of overseas insurance and reinsurance capacity available in respect of Victorian risks’.

The Bill has since been passed, receiving royal assent on 24 September 2007. The legislation provides, inter alia, that all direct offshore foreign insurers seeking to carry on business in Australia will be required to become authorised under the Insurance Act 1973 (Cth). Limited exceptions would apply to insurance risks that cannot be appropriately placed with an authorised general insurer.

Currently, direct offshore foreign insurers are not considered to be carrying on insurance business under the Insurance Act, are not authorised by the Australian Prudential Regulatory Authority or required to comply with Australia’s general insurance prudential requirements. To the extent that they are carrying on a financial services business in Australia, as defined under the Corporations Act, they are subject to consumer protection legislation in Australia. They are required to hold an Australian financial services licence and to comply with the conditions of that licence.

Discretionary mutual funds will not be prudentially regulated under the Insurance Act but information will be collected by the regulatory authority to determine the nature and scope of their operations. The question of whether to prudentially regulate discretionary mutual funds and direct offshore foreign insurers arose in part out of the collapse of HIH Insurance Limited. The report of the Royal Commission into the collapse recommended that prudential regulation be extended to all discretionary like insurance products, to the extent possible within constitutional limits.

In light of the submissions received and the process of consultation the commission has modified the proposals and, in particular, has substituted the obligation to cooperate for the previously proposed duty to act in good faith.

The commission is not persuaded that the abovementioned and other issues raised in submissions should preclude the application of the amended overriding obligations to litigation funders, insurers and others who influence or control the conduct of parties to civil litigation.

6.3.6 Impact on self-represented and disadvantaged litigants

A number of submissions raised concerns that the proposed statutory obligations might be particularly detrimental to self-represented litigants and other litigants who are disadvantaged. For example, the Law Institute and PILCH expressed the view that the draft proposed obligation to act in ‘good faith’ was nebulous and that it was unrealistic to expect litigants without legal training or legal assistance to understand the proposed obligations. It was also suggested that the proposals have the potential to result in ‘unfair orders for costs or compensation against self-represented litigants who may have no means of understanding [the statutory] obligations’.

A number of such concerns have been addressed by modifications to the proposals. In particular, the obligation to act in good faith has been replaced by an obligation to cooperate. It is also proposed that leave of the court should be required before an application for sanctions can be pursued. Any costs orders or sanctions can only be imposed in the exercise of judicial discretion.

The commission is of the view that judicial officers will take into account all relevant considerations, including the circumstances of self-represented litigants, and those who may be disadvantaged, in determining whether costs or other sanctions are appropriate. The application of the overriding...
obligations to parties acting against self-represented or disadvantaged litigants is intended to redress the present imbalance of power and resources in the adversarial system. Additional reform recommendations in respect of self-represented litigants are discussed in Chapter 9.

6.3.7 Early disclosure of information

The Dibbs Abbott Stillman submission supported the availability of preliminary discovery so as to provide parties with an early opportunity to particularise their cases and fully understand the claims before they are required to respond. It argued that early discovery (ie, before a defence is filed) puts the parties on a level playing field in that both are able to see each other’s documents before affidavit material is prepared. The submission suggested a timetable for the provision of preliminary discovery as well as a new regime for the issuing and management of proceedings. The commission’s proposals in respect of discovery are dealt with in Chapter 6.

6.3.8 Expansion of model litigant guidelines

Mallesons Stephen Jaques acknowledged that some of the existing model litigant guidelines may be capable of application to all parties to civil litigation, but noted that other guidelines have no potential application to private parties. Guidelines that the firm considered as being capable of application (wholly or partially) to all parties to civil litigation include the requirements to:

- deal with claims promptly
- not cause unnecessary delay
- endeavour to avoid, prevent and limit the scope of legal proceedings
- consider ADR
- keep the costs of litigation to a minimum.

As an example of model litigant guidelines that should not be applicable to private parties, the firm cited

acting consistently in handling claims and litigation, not relying on technical defences and not pursuing appeals unless there is a belief of reasonable prospect of success, or that the appeal is otherwise justified in the public interest.

Mallesons also submitted that it would be inappropriate to impose an obligation on private parties to apologise ‘where there is a belief that the party or its lawyers have acted wrongfully or improperly’.

6.4 CERTIFICATION REQUIREMENTS

Submissions which addressed the issue were divided on the desirability of the proposed certification requirements. Some commentators raised concerns about the extent to which such requirements may cause problems for self-represented litigants or disadvantaged litigants. Several submissions suggested that vulnerable litigants would need to be provided with advice and support. The commission’s proposals for additional support for self-represented and vulnerable litigants are set out in Chapter 9.

Other submissions supported the proposals but raised issues about how the merits test might be satisfied. To some extent such concerns have been addressed by the amendment to the merits test in the commission’s present proposals. Several submissions suggested that the merits certification should only be given by lawyers and not parties. Telstra raised questions about whether in-house corporate lawyers or external lawyers would be required to provide the certification.

6.5 OVERRIDING PURPOSE AND DUTIES OF THE COURT

Opinions on the desirability of the proposed overriding purpose and duties of the court were divided, although many submissions did not expressly deal with this issue. In part those opposed to the proposal contended that courts already have sufficient powers.

Support for the proposals came from a number of judicial officers and law firms, community legal centres, and the large commercial litigation funder, IMF Australia. IMF suggested that the obligations proposed to be imposed on lawyers and parties to assist the court to achieve the overriding purpose should be extended to litigation funders and insurers. It also suggested that the courts should collect additional data to facilitate more informed policy decisions.

377 Ibid.
378 Ibid.
379 Ibid.
381 Submissions ED1 31 (Law Institute of Victoria), ED1 20 (Public Interest Law Clearing House), 382 Ibid. See also Submission ED1 20 (Public Interest Law Clearing House).
383 Submission CP 11 (Dibbs Abbott Stillman).
384 Submission CP 49 (Mallesons Stephen Jaques).
385 Ibid.
386 Submission ED1 19 (Human Rights Law Resource Centre).
387 Submission ED1 25 (Victoria Legal Aid).
388 Submissions ED1 11 (Mental Health Legal Centre), ED1 20 (Public Interest Law Clearing House), ED1 19 (Human Rights Law Resource Centre).
389 Submission ED1 17 (Telstra Corporation).
390 Submission ED1 8 (IMF Australia Ltd).
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7. BEHAVIOURAL AND CULTURAL CHANGE

Civil procedural reforms may often facilitate cultural and behavioural change. In some circumstances, the objectives sought to be achieved by such reform may be frustrated by the failure to bring about necessary changes in attitude and conduct.

The importance of behavioural and cultural change has been recently reiterated by the Victorian Bar. Its submission noted that:

*The success of the Woolf reforms owed much to the success of the cultural shifts made by the judiciary and the legal profession. For example, barristers and solicitors had to learn that it is no longer acceptable to expect to use civil processes to gain tactical advantages in litigation. This type of change represented a fundamental shift in deeply ingrained mindsets. We suggest that a similar willingness to make radical changes to philosophies and practices will also be required to successfully embed Victorian reform efforts.*

The Bar stated that it recognised that a shift is now necessary, and confirmed that it is committed to working with its members and other professionals to begin the process of change.

Although there have been important changes in civil procedure, the judicial management of proceedings and the conduct of civil litigation in Victorian courts in recent years, the commission is of the view that further reform is required and that this process needs to be accelerated.

The imposition of overriding obligations on key participants in civil proceedings in Victorian courts, the introduction of overriding purpose provisions to assist the courts, and the introduction of more onerous merit certification requirements for both lawyers and litigants, are all means by which the processes for resolving disputes, and the judicial management of such processes, will be improved.

RECOMMENDATIONS

16. New provisions should be enacted in respect of (a) standards of conduct in civil proceedings (b) verification of the allegations made in pleadings and (c) the overriding purpose of relevant statutory provisions and procedural rules.

16.1 New provisions should be enacted to prescribe standards of conduct in civil proceedings, and to facilitate cooperation between the participants in a civil proceeding, candour and early disclosure of relevant information, and early resolution of the dispute - including by agreement of the parties or through alternative dispute resolution processes at minimal cost to the parties. There should be sanctions and penalties for non-compliance with these overriding obligations. Such sanctions should only come into force 12 months after the obligations take effect and any application should require leave of the court.

16.2 There should be new requirements for parties and lawyers to certify or verify that allegations in pleadings have merit.

16.3 There should be an overriding provision to the effect that relevant legislation and procedural rules are to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.

Such provisions should be along the lines of the following draft:

Section /Rule A: overriding obligation

(1) These provisions apply to the conduct or defence of any aspect of a civil proceeding, including any interlocutory proceeding, and any appeal from any order or judgment in a proceeding (‘a civil proceeding’) where such civil proceeding is in the Magistrates’ Court, the County Court, the Supreme Court or the Court of Appeal (a “Victorian court’), and to any alternative dispute resolution process undertaken in relation to any civil proceeding pending in a Victorian court.

(2) These provisions apply to:

(a) any person who is a party to a civil proceeding

(b) any legal practitioner or other representative acting on behalf of a party to a civil proceeding

(c) any law practice acting on behalf of a party to a civil proceeding
(d) any person providing any financial or other assistance to any party to a civil proceeding, including an insurer or a provider of funding or financial support, insofar as such person exercises any direct or indirect control or influence over the conduct of any party in a civil proceeding (‘the participants’).

(3) These provisions:
   (a) do not apply to witnesses as to fact
   (b) (other than subsections 4(b), (c), (f)) apply to expert witnesses.

(4) Each of the persons to whom this part applies has a paramount duty to the court to further the administration of justice. Without limiting the generality of this obligation, in all aspects of the proceeding (including any ancillary processes such as negotiation and mediation), each of the participants:
   (a) shall at all times act honestly
   (b) shall not make any claim or respond to any claim in the proceeding, or assist in the making of any claim or response to any claim in the proceeding, where a reasonable person would believe that the claim or response to claim is frivolous, vexatious, for a collateral purpose or does not have merit
   (c) shall not take any step in the proceeding in connection with a claim or response to a claim, or assist in the taking of any step or response to any step, unless reasonably of the belief that such step is reasonably necessary to facilitate the resolution or determination of the proceeding
   (d) has a duty to cooperate with the parties and the court in connection with the conduct of a civil proceeding
   (e) has a duty not to engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or knowingly aid, abet or induce any other participant to engage in conduct which is misleading or deceptive or which is likely to mislead or deceive
   (f) shall use reasonable endeavours to resolve the dispute by agreement between the parties, including, in appropriate cases, through the use of alternative dispute resolution processes
   (g) where the dispute is unable to be resolved by agreement, shall use reasonable endeavours to resolve such issues as may be resolved by agreement and to narrow the real issues remaining in dispute
   (h) shall use reasonable endeavours to ensure that the legal and other costs incurred in connection with the proceeding are minimised and proportionate to the complexity or importance of the issues and the amount in dispute
   (i) shall use reasonable endeavours to act promptly and to minimise delay
   (j) has a duty to disclose, at the earliest practicable time, to each of the other relevant parties to the proceeding, the existence of all documents in their possession, custody or control of which they are aware, and which they consider are relevant to any issue in dispute in the proceeding, other than any documents the existence of which is protected from disclosure on the grounds of privilege which has not been expressly or impliedly waived, or under any other statute.

(5) Subsections 4(b) and (c) do not apply to preliminary steps, preliminary legal work or preliminary financial or other assistance for the purpose of a proper and reasonable consideration of whether a claim, proceeding or defence of a claim or proceeding or a step in a proceeding has merit.

(6) The obligations imposed by this part shall override any legal, ethical, contractual or other obligation which the person may have insofar as they are inconsistent with such obligations. The obligations in this part apply to any legal practitioner engaged on behalf of a client in connection with a civil proceeding, despite any
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obligation that the legal practitioner or law practice may have to act in accordance with the instructions or wishes of a client.

Penalty Provisions

(7) Provisions for penalties for breach of the overriding obligations will come into effect 12 months after the obligations take effect. Such penalties will only apply to breaches arising after that date. The delay in implementation of the penalty provisions shall not prevent the court from exercising any power it already has, including in relation to costs.

(8) Where the court is satisfied that, on the balance of probabilities, a person to whom this part applies has failed to act in accordance with the obligations imposed by this part the court may, of its own motion or on the application of any party or person with a sufficient interest, in addition to any other order that the court has power to make, make such order as the court considers in the interests of justice, including:

(a) an order that the person pay some or all of the legal or other costs or expenses of any person arising out of the failure to act in accordance with the obligations imposed by this section

(b) an order that the person compensate any person for any financial or other loss which was materially contributed to by the failure to act in accordance with the obligations imposed by this section, including an order for penalty interest in respect of any delay in the payment of any amount claimed in a civil proceeding or an order that there be no interest, or reduced interest, where there has been a failure on the part of any participant involved in the bringing of the claim

(c) an order that the person take such steps in a civil proceeding as may be reasonably necessary to remedy any problem arising out of the failure to act in accordance with the obligations imposed by this section

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

(e) such order as the court considers to be in the interest of any person who has been prejudiced by the failure to act in accordance with the obligations imposed by this section

(f) an order that the person pay into the Justice Fund such amount as the court considers reasonable having regard to the time spent by the court as a result of:

(i) the failure to act in accordance with the obligations imposed by this section, or

(ii) any civil claim or civil proceeding arising out of the failure to act in accordance with the obligations imposed by this section, including an application for an order under this section.

(9) Any application under section 8 by a party or person with sufficient interest may only be made with leave of the court.

(10) An application under section 8 shall be made in the court in which the proceeding is being heard or was heard and, where practicable and without limiting the discretion of the court to decide how and by whom such application should be determined, such application may be dealt with initially by the judicial officer who is most familiar with the proceeding which gave rise to the application.

(11) An application under section 8 shall be made not later than 28 days from the date of final determination of the proceeding. Where an order in respect of costs is made after the date of judgment or final determination of the proceeding the date of the making of the last of any such order shall be the date of final determination of the proceeding for the purposes of this section.
Comment 1: It may be necessary to include a provision to the effect that a person against whom sanctions are sought after the adjudication of the dispute cannot seek to disqualify, on the grounds of reasonable apprehension of bias, the judicial officer who heard the proceedings from dealing with the application for sanctions.

Comment 2: There should be provision to the effect that where application is made in connection with an interlocutory step or an ADR process prior to the likely trial of the matter, the judicial officer to whom such application is made may refer the application to another judicial officer so as to avoid (a) becoming aware of information or (b) being required to make a determination that might provide a basis for a subsequent application that the judicial officer be disqualified from conducting the trial.

Comment 3: There may need to be provision for extensions of time to deal with situations where the knowledge of the breach arises after the deadline for making an application.

Certification Provisions

(12) Each party to a proceeding is required:
   (a) to personally certify that they have read and understood the overriding obligations. Such certification must be filed when the party files its first document in the proceeding
   (b) when filing any pleading (including any amendment of the pleading), to certify on the pleading, or verify on affidavit or by statutory declaration, that:
      (i) as to any allegations of fact in the pleading, the deponent believes that the allegations have merit
      (ii) as to any allegations of fact that the pleading denies, the deponent believes that the allegations do not have merit
      (iii) as to any allegations of fact that the pleading does not admit, after reasonable inquiry the deponent does not know whether or not the allegations have merit.

Comment 4: ‘Court documentation’ may be preferable to the term ‘pleading’. See, eg, Legal Profession Act 2004 (NSW) s 347(4).

(13) A determination of whether any allegation of fact has merit shall, in the case of a party, be based on a reasonable belief as to the truth of the allegation.

(14) Legal practitioners are required, when filing any statement of claim or other originating process, defence or further pleading on behalf of a party, to certify on the document that:
   (a) each allegation in the document has merit
   (b) each denial in the document has merit
   (c) each nonadmission in the document arises out of an inability to determine the merit of the allegation.

Comment 5: ‘Court documentation’ may be preferable to the term ‘pleading’. See, eg, Legal Profession Act 2004 (NSW) s 347(4).

(15) A determination as to whether an allegation has merit shall, in the case of a legal practitioner, be based on the available factual material and evidence and a reasonable view of the law.

Overriding Purpose and the Duties of the Court

(16). The overriding purpose of this Act and the rules of court, in their application to civil proceedings, is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute by (i) the just determination of the proceeding by the court or (ii) the agreement of the parties or (iii) an alternative dispute resolution process agreed to by the parties or ordered by the court.

(17). The court must seek to give effect to the overriding purpose when it interprets or exercises any of its powers, whether derived from procedural rules or as part of its inherent, implied or statutory jurisdiction.
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(18). Parties to a civil proceeding are subject to the overriding obligations in section 4 and are under a duty to the court to assist the court to further the overriding purpose.

(19). Legal practitioners or any other representatives acting on behalf of a party are subject to the overriding obligations contained in section 4 and are under a duty to the court to assist the court to further the overriding purpose and shall not by their conduct cause their clients to be put in breach of section 5 or the overriding obligations contained in section 4.

(20). The court may take into account any failure to comply with sections 18 or 19 in exercising any power, including its discretion with respect to costs.

(21). To further the overriding purpose, the court in making any order or giving any direction in a civil proceeding—

(a) shall have regard to the following objects:

(i) the just determination of the proceeding

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

(iii) the efficient disposal of the business of the court

(iv) the efficient use of available judicial and administrative resources

(v) the timely disposal of the proceeding

(vi) dealing with the case in ways which are proportionate to:

• the amount of money involved

• the importance and complexity of the issues

• the financial position of each party.

(b) may, in addition to any other matter, have regard to the following considerations to the extent that the court thinks relevant:

(i) the extent to which the parties have complied with any pre-action procedural obligations or protocol applicable to the dispute

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

(iii) the degree of expedition with which the respective parties have approached the proceeding, including the degree to which they have been timely in their interlocutory steps

(iv) the degree to which any lack of expedition in approaching the proceeding has arisen from circumstances beyond the control of the respective parties

(v) the degree to which there has been compliance with the overriding obligations contained in sections 4, 18 and 19

(vi) the degree of injustice that may be suffered by any party as a consequence of any order or direction under consideration and

(c) should, in addition to any other matter, have regard to the objective of minimising any delay between the commencement of the civil proceeding and its listing for trial beyond that reasonably required for such interlocutory steps as are necessary for the fair and just determination of the real issues in dispute and the preparation of the case for trial.