

Sentencing wrap up

# Presenting a plea in mitigation of penalty

- Circumstances of offending, including maximum penalty, aggravating/mitigating matters, objective gravity, effect on the victim
- Plea of guilty and timing, query accompanied by remorse as well as utilitarian benefit
- Personal circumstances, including age, educational and professional history, family circumstances, any relevant medical / psychological / drug and alcohol history
- Previous criminal history and significance
- Relevant sentencing principles
- Relevant sentencing purposes
- Conclude with realistic submission as to appropriate penalty (type, not quantum)

# Circumstances and gravity of the offence

- See Victorian Sentencing Manual, Part 5
- Examples of factors which assist with evaluating gravity of offending:
  - Planning and scale
  - Intent and knowledge (eg, intent vs recklessness)
  - Role
  - Impact on and circumstances of victim, eg if victim was vulnerable; extent of benefit to accused
  - Use of weapons
  - Whether offence was committed in company

# Circumstances of offender

- See Victorian Sentencing Manual, Part 6
- Examples of relevant factors:
  - Age, eg youth (rehabilitation may be emphasised) or advanced (remaining years of life limited, consider impact of imprisonment)
  - Health (physical, mental)
  - Substance abuse, eg may influence capacity for rehabilitation
  - Prior character
  - Motive
  - Education, employment
  - Disadvantage
  - Remorse if not already discussed
  - Restitution if any

# Sentencing principles

- See Victorian Sentencing Manual, Part 3 (<https://resources.judicialcollege.vic.edu.au/article/669236/section/248>):
  - Proportionality
  - Parsimony
  - Totality

# Sentencing purposes

- See Victorian Sentencing Manual, Part 4
  - Just punishment
  - General and specific deterrence
  - Rehabilitation
  - Denunciation
  - Community protection

# Introducing the Civil Procedure Act 2010 (Vic)

- This discussion:
- Ch 1 (Preliminary): ss 1, 4 and 6
- Part 2.1 (Overarching Purpose): ss 7-9
- Part 2.2 (Application of the Overarching Obligations): ss 10-15
- Part 2.3 (The Overarching Obligations): ss 16-27
- Part 2.4 (Sanctions for Contravening the Overarching Obligations): ss 28-31
- And, anticipatory cross-referencing with the Supreme Court (General Civil Procedure) Rules 2015 (Vic), and cross-referencing ethics and evidence which we have already discussed

# Shifting resources

- We move from the Judicial College of Victoria resources on criminal procedure, to those of civil procedure
- You can find these at <https://www.judicialcollege.vic.edu.au/resources#Civil>, starting with the Civil Procedure Bench Book at <https://www.judicialcollege.vic.edu.au/eManuals/Civil/index.htm#30884.htm>



# Civil Procedure Act, Part 1 (Preliminary)

- 1 Purposes
- (1) The main purposes of this Act are—
- (a) to reform and modernise the laws, practice, procedure and processes relating to civil proceedings in the Supreme Court, the County Court and the Magistrates' Court and provide for uniformity;
- (b) to simplify the language relating to civil procedure;
- (c) to provide for an overarching purpose in relation to the conduct of civil proceedings to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute;
- (d) to amend various Acts in relation to the conduct of civil proceedings to reflect the new procedures.

# S 4, 6: Application, and coexistence with Charter of Human Rights

- S 4: Act applies to all civil proceedings except some specified exceptions
- S 6: Nothing in this Act is intended to override—
  - (a) the **Charter of Human Rights and Responsibilities Act 2006**; or
  - (b) the doctrine of privilege, whether arising by or under the common law, statute or otherwise.

# Part 2.1 (Overarching purpose)

- S 7: Overarching purpose
- (1) The overarching purpose of this Act and the rules of court in relation to civil proceedings
- is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute.
- (2) Without limiting how the overarching purpose is achieved, it may be achieved by—
  - (a) the determination of the proceeding by the court;
  - (b) agreement between the parties;
  - (c) any appropriate dispute resolution process—
    - (i) agreed to by the parties; or
    - (ii) ordered by the court.

# S 8 Court to give effect to overarching purpose

- (1) A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—
  - (a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or
  - (b) in the case of a court other than the Supreme Court are part of the court's implied jurisdiction or statutory jurisdiction; or
  - (c) arise from or are derived from the common law or any procedural rules or practices of the court.
- (2) Subsection (1) applies despite any other Act (other than the Charter of Human Rights and Responsibilities Act 2006) or law to the contrary.

# 9 Court's powers to further the overarching purpose

- (1) In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects—
  - (a) the just determination of the civil proceeding;
  - (b) the public interest in the early settlement of disputes by agreement between parties;
  - (c) the efficient conduct of the business of the court;
  - (d) the efficient use of judicial and administrative resources;
  - (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—
    - (i) the fair and just determination of the real issues in dispute; and
    - (ii) the preparation of the case for trial;
  - (f) the timely determination of the civil proceeding;
  - (g) dealing with a civil proceeding in a manner proportionate to—
    - (i) the complexity or importance of the issues in dispute; and
    - (ii) the amount in dispute.

# S 9 cont

- (2) For the purposes of subsection (1), the court may have regard to the following matters—
  - (a) the extent to which the parties have complied with any mandatory or voluntary pre litigation processes;
  - (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
  - (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding;
  - (d) the degree to which any lack of promptness by a party in undertaking the proceeding has arisen from circumstances beyond the control of that party;
  - (e) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the proceeding;
  - (f) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court;
  - (g) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;
  - (h) the extent to which the parties have had the benefit of legal advice and representation.

# Part 2.2: Application of the Overarching Obligations

- S 10(1): The overarching obligations apply to—
  - (a) any person who is a party;
  - (b) any legal practitioner or other representative acting for or on behalf of a party;
  - (c) any law practice acting for or on behalf of a party;
  - (d) any person who provides financial assistance or other assistance to any party in so far as that person exercises any direct control, indirect control or any influence over the conduct of the civil proceeding or of a party in respect of that civil proceeding, including, but not limited to—
    - (i) an insurer;
    - (ii) a provider of funding or financial support, including any litigation funder.
- But they do not apply to any witness in a civil proceeding (s 10(2)), except expert witnesses (s 10(3), except overarching obligations in ss 18, 19, 22 and 26, in addition to any existing duties on expert witnesses)

# Ss 11-12

- S 11: Application of overarching obligations:
- Apply in respect of the conduct of any aspect of a civil proceeding in a court, including interlocutory application or interlocutory proceeding, appeals from orders and judgments in civil proceedings, and any ADR processes
- S 12: Subject to the paramount duty, the overarching obligations prevail over any legal obligation, contractual obligation or other obligation which a person to whom the overarching obligations apply may have, to the extent that the obligations are inconsistent.



# S 13: Overarching obligations and legal practitioners

- (1) The overarching obligations do not override any duty or obligation of a legal practitioner to a client, whether arising under the common law or by or under any statute or otherwise, to the extent that those duties and obligations and the overarching obligations can operate consistently.
- (2) Despite subsection (1), a legal practitioner or a law practice engaged by, or on behalf of, a client in connection with a civil proceeding must comply with the overarching obligations despite any obligation the legal practitioner or the law practice has to act in accordance with the instructions or wishes of the client.
- (3) In the case of any inconsistency between any overarching obligation and a duty or obligation referred to in subsection (1) or an instruction or a wish referred to in subsection (2)—
  - (a) the overarching obligation prevails to the extent of that inconsistency; and
  - (b) in the case of the instruction or wish of a client, the legal practitioner is not required to comply with any instruction or wish of the client which is inconsistent with the overarching obligation.

# Ss 14-15, and prompt to cross-ref ethics

- S 14: Legal practitioner or law practice not to cause client to contravene overarching obligations
- S 15: Legal practitioner's duty to court not overridden
- Be conscious of this express reference to consider ethical responsibilities

## Part 2.3 – The overarching obligations

- 16 Paramount duty
- Each person to whom the overarching obligations apply has a paramount duty to the court to further the administration of justice in relation to any civil proceeding in which that person is involved, including, but not limited to—
  - (a) any interlocutory application or interlocutory proceeding;
  - (b) any appeal from an order or a judgment in a civil proceeding;
  - (c) any appropriate dispute resolution undertaken in relation to a civil proceeding.
- 17 Overarching obligation to act honestly
- A person to whom the overarching obligations apply must act honestly at all times in relation to a civil proceeding [**cross-ref ethics**].

- **18 Overarching obligation—requirement of proper basis**

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

- (a) is frivolous; or

- (b) is vexatious; or

- (c) is an abuse of process; or

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

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

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

- **20 Overarching obligation to cooperate in the conduct of civil proceeding**
- A person to whom the overarching obligations apply must cooperate with the parties to a civil proceeding and the court in connection with the conduct of that proceeding.
- **21 Overarching obligation not to mislead or deceive**
- A person to whom the overarching obligations apply must not, in respect of a civil proceeding, engage in conduct which is—
  - (a) misleading or deceptive; or
  - (b) likely to mislead or deceive.

- **22 Overarching obligation to use reasonable endeavours to resolve dispute**

- A person to whom the overarching obligations apply must use reasonable endeavours to resolve a dispute by agreement between the persons in dispute, including, if appropriate, by appropriate dispute resolution, unless—
  - (a) it is not in the interests of justice to do so; or
  - (b) the dispute is of such a nature that only judicial determination is appropriate.

- **Example**

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

- **23 Overarching obligation to narrow the issues in dispute**

- If a person to whom the overarching obligations apply cannot resolve a dispute wholly by agreement, the person must use reasonable endeavours to—
  - (a) resolve by agreement any issues in dispute which can be resolved in that way; and
  - (b) narrow the scope of the remaining issues in dispute—
- unless—
  - (c) it is not in the interests of justice to do so; or
  - (d) the dispute is of such a nature that only judicial determination is appropriate.

- **24 Overarching obligation to ensure costs are reasonable and proportionate**
- A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to—
  - (a) the complexity or importance of the issues in dispute; and
  - (b) the amount in dispute.
- **25 Overarching obligation to minimise delay**
- For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to—
  - (a) act promptly; and
  - (b) minimise delay.

- **26 Overarching obligation to disclose existence of documents**

- (1) Subject to subsection (3), a person to whom the overarching obligations apply must disclose to each party the existence of all documents that are, or have been, in that person's possession, custody or control—
  - (a) of which the person is aware; and
  - (b) which the person considers, or ought reasonably consider, are critical to the resolution of the dispute.
- (2) Disclosure under subsection (1) must occur at—
  - (a) the earliest reasonable time after the person becomes aware of the existence of the document; or
  - (b) such other time as a court may direct.
- (3) Subsection (1) does not apply to any document which is protected from disclosure—
  - (a) on the grounds of privilege which has not been expressly or impliedly waived; or
  - (b) under any Act (including any Commonwealth Act) or other law.
- (4) The overarching obligation imposed by this section—
  - (a) is an ongoing obligation for the duration of the civil proceeding; and
  - (b) does not limit or affect a party's obligations in relation to discovery.
- [CROSS-REF ETHICS, CROSS-REF DISCOVERY IN CIVIL PROCEDURE ACT AND RULES]



- **27**      **Protection and use of information and documents disclosed under overarching obligation in section 26**
- (1)            A person who receives any information or documents provided by another person involved in the civil proceeding as a result of disclosure in compliance with the overarching obligation in section 26 is subject to an obligation not to use the information or documents, or permit the information or documents to be used, for a purpose other than in connection with the civil proceeding.
- (2)            The obligation under subsection (1) is taken to be an obligation to the court, contravention of which constitutes contempt of court.
- (3)            A person—
- (a)            may agree in writing to the use of information or documents otherwise protected under subsection (1); or
- (b)            may be released from the obligation imposed under subsection (1) by leave of the court.
- (4)            Without limiting this section or discovery in any civil proceeding any information or documents exchanged in compliance with the overarching obligation in section 26 is required to be discovered in the civil proceeding to be admissible in that proceeding.
- [CROSS-REF ETHICS]

## Part 2.4: Sanctions for contravening the overarching obligations

- **28 Court may take contravention of overarching obligations into account**
- (1) In exercising any power in relation to a civil proceeding, a court may take into account any contravention of the overarching obligations.
- (2) Without limiting subsection (1), in exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.

# 29 Court may make certain orders

- (1) If a court is satisfied that, on the balance of probabilities, a person has contravened any overarching obligation, the court may make any order it considers appropriate in the interests of justice including, but not limited to—
  - (a) an order that the person pay some or all of the legal costs or other costs or expenses of any person arising from the contravention of the overarching obligation;
  - (b) an order that the legal costs or other costs or expenses of any person be payable immediately and be enforceable immediately;
  - (c) an order that the person compensate any person for any financial loss or other loss which was materially contributed to by the contravention of the overarching obligation, including—
    - (i) an order for penalty interest in accordance with the penalty interest rate in respect of any delay in the payment of an amount claimed in the civil proceeding; or (ii) an order for no interest or reduced interest;
  - (d) an order that the person take any steps specified in the order which are reasonably necessary to remedy any contravention of the overarching obligations by the person;
  - (e) an order that the person not be permitted to take specified steps in the civil proceeding;
  - (f) any other order that the court considers to be in the interests of any person who has been prejudicially affected by the contravention of the overarching obligations.
- (2) An order under this section may be made— (a) on the application of (i) any party to the civil proceeding; or (ii) any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or (b) on the court's own motion.

# 30 Applications for orders under section 29

- (1) An application for an order under section 29 is to be made—
  - (a) in the court in which the civil proceeding was, or is being, heard; and
  - (b) in accordance with the rules of court.
- (2) An application for an order under section 29 must be made prior to the finalisation of the civil proceeding to which the application relates (excluding any period for appeals).
- (3) For the purposes of subsection (2), if an order, including an order in respect of costs, is made after the date of finalisation of the civil proceeding to which the application relates, the date of making of the last of the orders is taken to be the date of finalisation of that proceeding.
- S 31: court may extend time