

# FOLEY'S | LIST



## **PRESENTERS**

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## **CHAIR**

**Sam Horgan QC**

Date: 15 March, 2017

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**Costs orders against lawyers under the *Civil Procedure Act 2010* (Vic) ('CPA'): How can commercial litigators be caught out?**

**Naomi Lenga  
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15 March 2017**

**Sources of the power to make a costs order against legal practitioners personally under the CPA:**

1. **Section 56(2)(c)** – A court may make a costs order against any party or legal practitioner who is responsible for, or who aids and abets:
  - a. a failure to comply with discovery obligations; or
  - b. a failure to comply with any order or direction of the court in relation to discovery; or
  - c. conduct intended to delay, frustrate or avoid discovery of discoverable documents.
  
2. **Section 28(2)** – In exercising its discretion as to costs, a court may take into account any contravention of the overarching obligations.
  
3. **Section 29** – 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. This includes a personal costs order against a legal practitioner.
  - a. **Who can apply for a costs order to be made against a legal practitioner?** Section 29(2)
    - i. any party to the civil proceeding;
    - ii. any other person who, in the opinion of the court, has a sufficient interest in the proceeding; or
    - iii. on the court's own motion.
  
  - b. **Time limit:** section 30(2) – an application for an order must be made prior to the finalisation of the civil proceeding. See *Gippsreal Ltd v Kenny* [2016] VSCA 319 and *1165 Stud Road v Power & Ors (No 2)* [2015] VSC 735 where the right to make an application under section 29 was statute barred by the operation of the time limit in section 30.
  
  - c. **Extension of time for application:** section 31(2) – court may grant extension of time for making an application under section 29 if satisfied that the person making the application was not aware of the contravention of the overarching obligations until after the end of the specified period.

## Cases

1. *Yara Australia Pty Ltd & Ors v Oswal* [2013] VSCA 337

A large volume of material provided that was unnecessary and excessive amounted to a breach of section 24 CPA to ensure that legal costs are reasonable and proportionate.

2. *Ilievksi v Zhou* [2014] VSC 442

Solicitors sitting on a matter and asking for funding too late resulted in the client being unable to fund, solicitors going off the record and the trial having to be adjourned. Solicitors were ordered to pay the costs thrown away as a result of the adjournment.

3. *Brown v Guss (No 2)* [2015] VSC 57

A solicitor was ordered to pay part of the estate's costs on an indemnity basis because he breached his overarching duties to the Court by:

- a) placing himself in a position of conflict (being a material witness in the proceedings and acting as solicitor for one of the parties);
- b) pursuing frivolous and vexatious litigation on behalf of his client in order to ventilate his own grievances against the deceased and executor; and
- c) misleading and deceiving the Court.

4. *De Costi Seafoods (Franchises) Pty Ltd & Anor v Wachtenheim & Anor (No 6)* [2016] NSWDC 378

Costs orders were made against legal practitioners after the duration of the proceedings was lengthened due to needlessly irrelevant content and the number of affidavits sworn.



# Evidence preparation – maintaining visual of ethical obligations in the ‘fog of war’

15 March 2017

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# The relevant obligations and consequences of their breach

- *Civil Procedure Act 2010* (Vic)
  - s 17 (overarching obligation to act honestly)
  - s 21 (overarching obligation not to mislead or deceive)
    - Note: there is no requirement that the conduct be knowingly misleading or deceptive.  
*Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567, [178]
  - s 29 (court may make any order it considers appropriate in the interests of justice)

# The relevant obligations and consequences of their breach

- Common law
  - Duty not to mislead as to the facts: *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567, [165]
  - Costs may be ordered against practitioners in the inherent disciplinary jurisdiction of the court: *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2014] VSC 400, [49]
- *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r 63.23
  - Orders may be made “[w]here a solicitor for a party has caused costs to be incurred improperly or without reasonable cause or to be wasted by a failure to act with reasonable competence and expedition”

# How can the obligations affect a practitioner's interaction with witnesses?

- Cannot 'coach' a witness to particular evidence favourable to the client
- Practitioners can properly refer material from the case to a witness for comment, including pleadings, affidavits, statements, exhibits or, subject to any contrary order, the evidence of witnesses that has already been given: *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567, [167]
- (Though query whether providing one of the client's witnesses with the evidential material of another of the client's witnesses in its entirety is best practice: see *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2014] VSC 400, [252]; *Day v Perisher Blue Pty Ltd* (2005) NSWLR 731; *Roads Corporation v Love* [2010] VSC 253)

# Implications for practitioners' involvement in the preparation of written evidence

- Affidavits, witness statements, witness outlines and experts' reports
- Practitioners will be involved in the drafting of those documents. In the case of the first three, lawyers often draft them.
- Practitioners can (and should) have input into the form of the evidence: *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424, [19] (Lindgren J) (in the context of expert evidence)



# Implications for practitioners' involvement in preparation of written evidence

- Lawyers should not 'settle' the evidence of experts in a way that changes or modifies the expert's evidence in a material respect.  
*Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567, [167]
- The same proposition undoubtedly applies to the evidence of lay witnesses  
*Overworked witness statements discredit the witness, embarrass legal practitioners involved in their preparation and undermine the trial process: Woodcroft-Brown v Timbercorp Securities Ltd* (2011) 253 FLR 240, [571]

# Situations where the 'fog of war' may be thickest

- Omissions and silence
  - *Meek v Fleming* [1961] 2 QB 366; *Clone Pty Ltd v Players Pty Ltd* [2016] SASCFC 134
- New information
  - *Vernon v Bosley (No 2)* [1999] QB 18; *Legal Services Commissioner v Mullins* [2006] LPT 12
- Amendments
  - *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567
  - *Hudspeth v Scholastic Cleaning & Consultancy Services Pty Ltd* (2014) 42 VR 236



***DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD***  
**v**  
***HUE BOUTIQUE LIVING PTY LTD (No 5) (2014) 48 VR 1***  
**[57], [118], [128]-[130], [136], [141]**

- Application by party s24(1) of *Supreme Court Act* 1986 (Vic) and r63.23 of the Rules.
- Application under s29 of the CPA based on an alleged want of compliance with s18(d) of the CPA (proper basis for a claim).
- Client legal privilege issues.

***STRAGLIANO v SCERRI* [2016] VSC 130  
[36], [80]-[85]**

- **Application under s29(1) of the CPA; Court acting on its own motion.**
- **Opening inconsistent with previous affidavit sworn by client allegedly raised inference that counsel had opened the case contrary to instructions.**
- **Solicitor allegedly failed to provide client with advice as to matters adverse to her claims.**
- **Client legal privilege issues.**