

Aon and its implications for the Commercial Court*

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Introduction

The decision of the High Court of Australia, in *Aon Risk Services v Australian National University* (2009) 239 CLR 175 provides authority for courts to take into account case management principles when exercising discretion in procedural applications, even to the prejudice of a party to a particular proceeding. The statements found in the three judgments in *Aon* were welcome recognition of the growing importance of active case management undertaken by judges. However, the High Court can only provide broad guidance to courts applying their own varied procedures to infinitely varied fact situations.

It is for each court, working within its rules, to adopt its own case management principles. The Commercial Court of the Supreme Court of Victoria is aiming to be an exemplary model in this regard. This paper will consider the ways that the Commercial Court applies the principles recognised in *Aon*.

The facts in *Aon*²

It is helpful to recount, briefly, the facts and procedural history of *Aon* in order to place the principles expounded in some context.

In December 2004, the Australian National University (ANU) commenced proceedings in the Supreme Court of the Australian Capital Territory. The ANU sought indemnities from three insurers for property losses suffered in the 2003 Canberra bushfires by reason of the destruction and damage to the buildings and contents at its Mount Stromlo Observatory Complex.

In June 2005, ANU joined its insurance broker, Aon Risk Services, claiming that Aon failed to renew insurance over some of the damaged property.

In November 2006, on the third day of a trial scheduled for four weeks, ANU settled with the insurers. Subsequently, ANU sought leave to amend its statement of claim to allege a new case against Aon, based upon an agreement not previously pleaded. The

² See *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 38-40.

trial was adjourned and the application for leave to amend was heard 12 days later. The decision granting leave to amend was not handed down for more than 10 months.

Aon appealed. The ACT Court of Appeal upheld the trial judge's decision with a further order that ANU pay Aon's costs related to the amendment on an indemnity basis. Aon sought special leave to appeal from the High Court. Notably, Justice Kiefel, whose decision as a trial judge was overturned by the High Court in *Queensland v J L Holdings Pty Ltd*,³ heard the application with Justice Gummow. Aon's application for special leave was successful.

As Heydon J noted in some detail in *Aon*, the procedural history of the case was not one of efficiency, though it was not in the same class as the Chancery proceedings in *Bleak House*. His Honour said:⁴

The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.

The aim of the Commercial Court is to avoid these sorts of problems, as is indicated in the "Court Objective and Policies" which are set out in the *Green Book*.⁵ Of particular relevance is the general approach which prefaces the more particular aspects of the Objective and Policies:⁶

- 2.1 The objective of the Commercial Court is to provide for the just and efficient determination of commercial disputes by the early identification of the substantial questions in controversy, and the flexible adoption of appropriate and timely procedures for the future conduct of the proceeding which are best suited to the particular proceeding.

³ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

⁴ *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 229.

⁵ Supreme Court of Victoria, *Practice Note No 1 of 2010 (Version 1.0) – Commercial Court ("the Green Book")*.

⁶ *Green Book*, pp. 3 and 4.

- 2.2. The practices and procedures set out in this Practice Note and used by the Commercial Court must be read and understood in the light of the Court Objective, which is paramount. These practices and procedures may be modified or abrogated to suit the requirements of a particular proceeding.

The needs of commercial litigants

Justice Heydon, in *Aon*, made specific reference to the important role that courts must play in ensuring the efficient disposition of commercial litigation. His Honour said:⁷

While in general it is now seen as desirable that most types of litigation be dealt with expeditiously, it is commonly seen as especially desirable for commercial litigation...Those claims rest on the idea that a failure to resolve commercial disputes speedily is injurious to commerce, and hence injurious to the public interest ... Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

It is clear that the judiciary must be attuned to, and must provide for, the realities and needs of commerce.⁸ Lord Mansfield's development of commercial law in the latter part of the eighteenth century is a prime example of the ability of the common law to be very proactive in this respect.⁹

⁷ *Aon* (2009) 239 CLR 175 at 223 to 224 per Heydon J.

⁸ The Hon. Justice Pagone, "The Role of the Modern Commercial Court", a paper presented to the Supreme Court Law Conference on 12 November 2009, 3.

⁹ J. M. Holden, *The History of Negotiable Instruments in English Law*, (University of London, The Athlone Press, 1955) 114:

A particularly important institution which he 'adapted and improved' was the special jury. Prior to his term of office, the use of this type of jury was unsystematised. He established it as a regular institution and went so far to gain the confidence of the experienced business men who sat as special jurors as to invite them to dine with him. It was largely as a result of Mansfield's special jury system that it was found possible 'to weld commercial usage into the main body of English law without the sacrifice of elasticity'. His practice was to incorporate customs into his judgments, and so establish them as binding rules for the future. If the practice on a particular subject was uncertain, then he would normally rely on the opinion of his special jurors. But once a point had been settled, it was, in his view, the judge's duty to adhere to it. [footnotes omitted]

Principles established or emphasised in *Aon*

The three judgments in *Aon* recognised that the starting point for an application to amend a statement of claim, and other procedural issues, is the proper application of the procedural rules.¹⁰ However, the High Court also stated some principles of general application to procedural issues.

The Chief Justice helpfully summarised the position in relation to applications to adjourn and amend:¹¹

In the proper exercise of the primary judge's discretion, the applications for adjournment and amendment were not to be considered solely by reference to whether any prejudice to *Aon* could be compensated by costs. Both the primary judge and the Court of Appeal should have taken into account that, whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings. Moreover, the time of the court is a publicly funded resource. Inefficiencies in the use of that resource, arising from the vacation or adjournment of trials, are to be taken into account. So too is the need to maintain public confidence in the judicial system. Given its nature, the circumstances in which it was sought, and the lack of a satisfactory explanation for seeking it, the amendment to *ANU's* statement of claim should not have been allowed.

The plurality¹² in *Aon* also summarised their position:¹³

[111] An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings*¹⁴ which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases.¹⁵ On the contrary, the statements are not consonant with this Court's earlier

¹⁰ See, for example, *Aon* (2009) 239 CLR 175 at 200 per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

¹¹ *Aon* (2009) 239 CLR 175 at 182 per French CJ.

¹² Ie the joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ.

¹³ *Aon* (2009) 239 CLR 175 at 217-218.

¹⁴ *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

¹⁵ See *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Imbree v McNeilly* (2008) 236 CLR 510 at 526 [45] per Gummow, Hayne and Kiefel JJ.

recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.

[112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

...

[114] ... Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of Aon. None was provided.

Case management is not an end in itself. Its goal is the creation of just and efficient outcomes for the parties to a particular case, as well as other litigants and the community at large. Parties will be given an opportunity to plead their case and raise all relevant issues, but, especially when litigation is advanced, a party is expected to provide an explanation, with very good reasons, as to why it is seeking to amend its case or seeking any other procedural indulgence. Costs may not be an adequate remedy for the prejudice that the other party will suffer or for any disruption to the court and other litigants. An amendment that would have the effect of vacating a trial date is especially serious.

In laying down these principles the High Court refused to adhere to its approach to these issues in *J L Holdings*, and returned to the position that was established previously in *Sali v SPC Ltd*.¹⁶ In *Sali* it was recognised that:¹⁷

What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.

Thus, in *Aon*, the High Court reemphasised that it is not sufficient to pursue just procedural outcomes merely by reference to the interests of the parties to the

¹⁶ (1993) 67 ALJR 841; 116 ALR 625.

¹⁷ (1993) 67 ALJR 841 at 844; 116 ALR 625 at 629, quoted in *Aon* (2009) 239 CLR 175 at 190 per French CJ.

particular proceeding. The effects that a procedural decision will have on other litigants and on the public's interest in the efficient use of the Court's resources must also be taken into account.

The notion that parties to a proceeding are not entitled to consume an unlimited amount of public resources in pursuit of their own interests seems eminently sensible and reasonable.¹⁸ It might be thought to be curious that this has not been the prevailing sentiment at the highest appellate levels for some time. Nevertheless, other jurisdictions have experienced the same phenomenon. In his reflection on the changes in civil litigation in England since the reform of the *English Civil Procedure Rules 1998* (the "Woolf reforms"¹⁹), Professor Zuckerman lamented that the benefits that were hoped for in 1998 have not materialised. He suggested that this is because of the primacy that the courts have continued to place on the rights of parties to pursue their own interests at the expense of other litigants and the public.²⁰

Clearly, the reluctance to accept fully the pre-eminent importance of case management powers is borne out of a principled, but perhaps overzealous, adherence to the belief that a procedural decision should never be allowed to impede the vindication of a substantive right. In Australia, until *Aon*, this belief has arguably, as in England, held too much sway at the highest appellate levels. As the procedural history of *Aon* demonstrated, it has often been used to justify delay and inefficiency on the part of a litigant – at the expense of other litigants, courts, and the public. The High Court stated explicitly - and emphasised - that this is no longer acceptable. The plurality recognised 'that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but also to other litigants'.²¹

¹⁸ A.A.S. Zuckerman, "Reform in the Shadow of Lawyers' Interests" in A.A.S. Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure – Essays on 'Access to Justice'* (Clarendon Press, 1995) 61, 73-76.

¹⁹ Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

²⁰ Adrian Zuckerman, "Litigation Management under the CPR: A Poorly-used Management Infrastructure" in Deirdre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press, 2009) 89, 102.

²¹ *Aon* (2009) 239 CLR 175 at 217.

Thus *Aon* gives critical acknowledgement at the highest level to the legitimacy of a court rejecting an application based on the conduct of an applicant in the context of the procedural history of a matter. Importantly, this is not the same as saying that ‘every application should be refused because it involves the waste of some costs and some degree of delay’.²² A key point to recognise is that the *Aon* approach does not change the fundamental purpose of a court, particularly a State Supreme Court as a fundamental part of the judicial system in this country.²³ It is emphasised in the judgments that parties ought to have ‘proper opportunity to plead their case’ and ‘sufficient opportunity to identify the issues they seek to agitate’. Rather, the significance of *Aon* is that it establishes that a trial judge is entitled to, and indeed must, make an assessment of whether an application is reasonable in the context of judicial case management. It is no longer acceptable for judges to maintain a ‘single minded attachment to justice on the merits to the exclusion of everything else’.²⁴

Since *Aon* was handed down, numerous judgments around Australia have referred to the decision.²⁵ It is beyond the scope of this paper to analyse each of these cases, but, for the most part, the judgments refer to *Aon* for the general principles it sets down in relation to procedural applications and the relevance of case management. In cases where the procedural history of a matter clearly shows unjustifiable delay, obstruction, or inefficiency, procedural indulgences have not been allowed.²⁶

²² Ibid 214.

²³ See *Kirk v Industrial Relations Commission of NSW & WorkCover NSW* (2010) 239 CLR 531.

²⁴ Zuckerman, above n 20, 98.

²⁵ See, for example, decisions in the Supreme Court of Victoria - *Walsh v Croucher* [2010] VSC 296; *Kruisselbrink v Nationwide Maintenance Services Pty Ltd* [2010] VSC 260; *Roads Corp v Love* [2010] VSC 238; *Hodgson v Amcor Ltd*; *Amcor Ltd v Barnes* [2010] VSC 204; *Slaveski v Victoria* [2010] VSC 200; *ACN 074 971 109 v National Mutual Life Association of Australasia Ltd* [2010] VSC 186; *Perpetual Trustees Australia Ltd v Schmidt* [2010] VSC 67; *Saeco Australia Pty Ltd, Re* [2010] VSC 161; *Roads Corp v Love* [2010] VSC 154 ; *Solak v Registrar of Titles (No 2)* [2010] VSC 146; *Equuscorp Pty Ltd v Acehand Pty Ltd* [2010] VSC 89; *Ambridge Investments Pty Ltd (in liq) v Baker* [2010] VSC 59; *AED Oil Ltd v Puffin FPSO Ltd (No 4)* [2010] VSC 65; *Environment East Gippsland Inc v VicForests (Ruling No 2)* [2010] VSC 53; *Hamilton v Kennedy* [2010] VSC 1; *Roads Corporation v Love* [2009] VSC 628; *AWB Ltd (No 10), Re*; *Australian Securities and Investments Commission v Lindberg* (2009) 76 ACSR 181; [2009] VSC 566; *Tinworth v WV Management Pty Ltd* [2009] VSC 552; *Love v State of Victoria (No 2)* [2009] VSC 531; *Skordos v His Honour Magistrate Garnett* [2009] VSC 512; *Perpetual Trustees Australia Ltd v Schmidt (Ruling)* [2009] VSC 508; *Nolan v MBF Investments Pty Ltd* [2009] VSC 457; *AWB Ltd (No 7), Re*; *Australian Securities and Investments Commission (ASIC) v Lindberg* [2009] VSC 413; *Anjin No 13 Pty Ltd v; Allianz Australia Insurance Ltd* [2009] VSC 371.

²⁶ Some examples are *Perpetual Trustees Australia Ltd v Schmidt* [2010] VSC 67; *Hamilton v Kennedy* [2010] VSC 1; *Tinworth v WV Management Pty Ltd* [2009] VSC 552 *Nolan v MBF Investments Pty Ltd* [2009] VSC 457; *AWB Ltd (No 7), Re*; *Australian Securities and Investments*

However, around the edges, where procedural indulgences are not so clear cut, I suspect that the practical significance of *Aon* remains to be seen.

Case management and the Commercial Court rules

The most important rules and procedures applicable to the Commercial Court are the *Supreme Court (General Civil Procedure Rules) 2005* and those set out in the *Green Book*.²⁷ It is in the context of the “Court Objective and Policies” of the Commercial Court that procedural issues are to be determined.²⁸ The *Green Book* contains detailed and specific provisions for the procedural steps of a Commercial Court proceeding – such as first directions, further directions, case management conferences and other applications. Each provision is, however, subject to the overriding requirement to give effect to the Court Objective, which is not to be triumphed over by procedural issues and delays.

Parties are entitled to raise all matters of controversy in their dispute. The Commercial Court’s procedures are very effective at identifying the issues. This often occurs at an early stage in the management of the case, and parties at this stage will frequently be given leave to amend their pleadings to reflect all matters actually in dispute. However, because the parties are given such a comprehensive opportunity to raise any issues in dispute, once pleadings are closed and the Case Management Conference²⁹ has been completed only in rare cases will a party be able to raise new issues.

Section 29(2) of the *Supreme Court Act 1986* (Vic) states that the Court “must so exercise its jurisdiction in every proceeding before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally

Commission (ASIC) v Lindberg [2009] VSC 413; and *Heng v (Australia) Pty Ltd v Wang* [2009] FCA 922.

²⁷ See also the *Supreme Court Act 1986* (Vic) particularly s 29(2).

²⁸ See *Green Book*, Paragraph 2, pp. 3 and 4.

²⁹ For further discussion of the importance of case management conferences see: The Hon. Justice Pagone, “The Role of the Modern Commercial Court”, a paper presented to the Supreme Court Law Conference on 12 November 2009, 3 and The Hon. Justice Davies, “Issues in case management – The case management conference” a paper presented at the Commercial Court CPD and CLE on 25 February 2010.

determined, and all multiplicity of proceedings concerning any of those matters is avoided.”

Rule 1.14 of the *Supreme Court (General Civil Procedure) Rules 2005* provides:

- (1) In exercising any power under these Rules the Court—
 - (a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;
 - (b) may give any direction or impose any term or condition it thinks fit.
- (2) The Court may exercise any power under these Rules of its own motion or on the application of a party or of any person who has a sufficient interest.

These mandatory provisions of the Act and the Rules are not inconsistent with the approach in *Aon*. In substance, their combined effect is that “as far as possible” the Court “must endeavour to ensure” that “all matters in dispute are complete and finally determined” and that “all questions in the proceeding are...completely...determined”.

The Commercial Court is not a court which is at all accommodating of time wasting, tactical, technical pleadings applications. It will not join in a “procedural orgy” the like of which have been only too prevalent in the courts for very many years in relation to the content and phraseology of pleadings and particulars. It is all the more a sad and unedifying spectacle, as we know from bitter experience, that these issues, which were often so hard-fought and at great expense, seldom mattered much, if at all, in the end as each party was really well aware of the case it had to meet. And, in any event, the importance of pleadings “battles” is further diminished when, at trial, evidence is led that does not go to proving a material fact in the hard-fought for pleading.³⁰ In circumstances where the parties disregard their pleadings “and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest”.³¹

³⁰ For the circumstances in which this can occur see LexisNexis, *Civil Procedure: Victoria*, vol 1 (at service 225) [I 13.01.10].

³¹ *Gould v Mount Oxide Mines Ltd (in liq)* (1916) 22 CLR 490 at 517 per Isaacs and Rich JJ.

For the purpose of amendment of pleadings, in *Aon* the High Court acknowledged in relation to the words “real issues in the proceeding”,³² that the “matters in dispute or the “questions” in the proceeding may expand beyond the pleadings as drafted at a particular time.³³ However, the matters in dispute must be those in dispute at the time and not something entirely new.³⁴

The Commercial Court process gives parties ample opportunity to raise issues in dispute. From the first directions hearing parties are invited to inform the court of the issues in dispute. At further directions hearings the judge is proactive in identifying the matters in dispute. Generally speaking, the matter will be ordered to mediation before a case management conference. Once the case management conference is reached the issues in dispute should be well defined. If the parties have fulfilled their obligations under the Commercial Court “Green Book”³⁵ this will almost certainly be the case. The draft list of issues as provided in the case management bundle confirms the matters in dispute. Once the case management conference is complete, usually with a trial date set down, the parties will, in almost all circumstances, be held to the issues already raised. Discretionary amendments under r 36.03(b) are unlikely. If amendments are allowed, parties can expect special costs orders. Practitioners may not escape unscathed either.

The importance of providing an explanation and the role of orders for costs

A requirement emphasised in the *Aon* decision is that significant importance will attach to any explanation or justification, or lack thereof, which is offered by an applicant seeking the benefit of a court’s discretion to grant a procedural indulgence.³⁶

As recognised by the plurality:³⁷

Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the

³² Found in r 501(a) of the *Court Procedure Rules 2006* (ACT)

³³ *Aon* (2009) 239 CLR 175 at 205.

³⁴ *Ibid.*

³⁵ Paragraph 2.4 of the Commercial Court “Green Book” where the parties undertake to approach their case co-operatively to achieve the “Court Objective”, to assist the Court in this respect and “not to use the resources of the Court and of the parties needlessly or in a manner that is out of proportion to the matters in issues” (see particularly, paragraphs 2.4.4, 2.4.5 and 2.4.6, p. 3).

³⁶ *Aon* (2009) 239 CLR 175 at 182 and 192 per French CJ; at 215-216 and 218 per Gummow, Hayne, Crennan, Kiefel and Bell JJ; at 228 per Heydon J.

³⁷ *Aon* (2009) 239 CLR 175 at 215.

amendment to the court's attention, so that they may be weighed against the effects of any delay and the objectives of the Rules.

Again, it would appear to accord with basic common sense that a party should furnish a court with reasons and justification for seeking orders that will result in waste of the resources of the opposing litigant and the public (and hence the position of other litigants in other proceedings). However, as identified in the joint judgement in *Aon*, there has been a tendency of litigants to perceive the granting of a procedural indulgence as 'something approaching a right' without need of adequate explanation.³⁸ In Australia, no doubt, this tendency was fuelled by *JL Holdings*. The Trial Judge in that case made mention of the fact that no satisfactory explanation was provided by the applicant as to why the application was being sought so late in the proceedings.³⁹ The High Court, at that time, clearly thought the lack of explanation to be of lesser importance than the mere existence of an arguable case. The High Court's view has now changed. Litigants should now assume that a court will conduct some rigorous inquiry into whether any waste of time or resources has been adequately justified by the applicant in the context of the particular proceedings.

Similarly, the High Court said that it is necessary for a court to consider, and robustly, whether an order for costs can adequately ameliorate procedural indulgence. In the joint judgement it was said that 'an application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs ... There is no such entitlement'.⁴⁰ The judgments expanded on this principle and emphasised that a consideration of the sufficiency of costs cannot occur without due reference to the impact of procedural inefficiency on other litigants and 'public confidence in the judicial system'.⁴¹

Thus the High Court has changed the landscape in indicating that it is fundamentally important for litigants and courts to accept the limited mitigating role that an order for costs can play. Orders for costs cannot compensate the litigants and the public who will bear the burden of the inefficient use of a court's resources. The High Court's emphasis of this point is very important. It means that litigants, and courts, will have

³⁸ Ibid 212.

³⁹ *JL Holdings Pty Ltd v Queensland & Anor* [1996] FCA 779.

⁴⁰ *Aon* (2009) 239 CLR 175 at 215.

⁴¹ Ibid 192.

to be frank about the possible shortcomings of an order for costs where procedural inefficiency is at issue and where these shortcomings are significant the balance will not favour procedural indulgence of a party.

The Role of the Commercial Court Judge

In managing commercial disputes each Commercial Court judge is striving to achieve the Court Objective. In pursuing this objective, the work of the Commercial Court exemplifies the fact that the modern judicial task ‘requires skills and imposes burdens that historically formed no part of the judicial role.’⁴²

The *Green Book* provides the framework in which the Commercial Court judge will operate. But, as has been recognised by Professor Zuckerman, ‘[t]he presence of a management infrastructure is not sufficient to deliver the hoped for results. These can be delivered only by managers willing to use the management tools to best effect.’⁴³ Thus the task of the Commercial Court judge inherently requires an understanding of the unique circumstances of a case from the commencement of proceedings. Having surveyed the issues, the challenge for the judge then becomes one of ‘striking the right balance’ as to the deployment of procedures that will deliver a just resolution in the most efficient way. This requires frank acknowledgement that, at times “demands which arise in managing a dispute are frequently irreconcilable and push or pull in different directions.”⁴⁴ It also requires an appreciation of the fact that speed does not necessarily equate with efficiency⁴⁵ and that ‘there also remain limitations necessarily and rightly founded in the judicial fundamentals of impartiality and procedural fairness.’⁴⁶ Notwithstanding these issues and challenges, *Aon* has confirmed that the objective of the Commercial Court is the kind of objective that judges must work hard to achieve.

⁴² The Hon. Ronald Sackville AO, “The future of case management in litigation”, (2009) 18 *Journal of Judicial Administration* 211, 217.

⁴³ Zuckerman, above n 20, 94.

⁴⁴ The Hon. Justice Pagone, above n 8, 12.

⁴⁵ The Hon. Justice Byrne, “Promoting the efficient, thorough and ethical resolution of commercial disputes: A judicial perspective” a paper presented at the LexisNexis Commercial Litigation Conference, Melbourne on 20 April 2005, p 2.

⁴⁶ The Hon. Michael Black AC, “The role of the judge in attacking endemic delays: Some lessons from Fast Track” (2009) 19 *Journal of Judicial Administration* 88, 91.

The Civil Procedure Bill 2010 (Vic)

On 22 June 2010, the Attorney-General, Mr Rob Hulls, introduced the *Civil Procedure Bill 2010* (Vic) (the Bill) into the Legislative Assembly of the Victorian Parliament.⁴⁷ The bill was passed by the Legislative Council on 12 August 2010 and is awaiting Royal Assent. The Bill has significant parallels with legislation that endorses case management objectives and judicial application of case management principles in other Australian jurisdictions.⁴⁸ The Bill is another step towards the objectives that the judges in *Aon* had in mind and which the Commercial Court aims to achieve. As has been recognised in extra-judicial writing by Justice Sackville:⁴⁹

There is a school of thought that specific legislative intervention in support of case management is unnecessary, since the rules or the inherent powers of the court confer ample authority on the judges to manage litigation in a manner that minimises delays and ensures that costs are proportionate to the matters in dispute. This view underestimates the significance of legislation.

Indeed, as has been recognised by Chief Justice Black (as he then was):⁵⁰

Any legislative indication of policy must stand as a powerful indication of the will of the Parliament about the values sought to be achieved by the way in which cases are managed in the courts and the balances that have to be struck ... Legislation imposing positive duties upon litigants and practitioners will help to change attitudes and, within constitutionally permissible limits, will confirm that judges do have the power they need to require parties to cooperate to bring about the just resolution of disputes as quickly, inexpensively and efficiently as possible.

Against this background some of the key features of the current Bill should be noted.

⁴⁷ The introduction of the Bill followed a significant reform process, see *Victorian Law Reform Commission, Civil Justice Review*, Report 14 (2008). The Right Honourable Lord Justice Jackson's Final Report - *Review of Civil Litigation Costs* (2009) also provided guidance, especially in relation to pre-action protocols.

⁴⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2607, Mr Hulls (Attorney-General).

⁴⁹ The Hon. Ronald Sackville AO, "The future of case management in litigation", (2009) 18 *Journal of Judicial Administration* 211, 217.

⁵⁰ The Hon. Michael Black AC, "The role of the judge in attacking endemic delays: Some lessons from Fast Track" (2009) 19 *Journal of Judicial Administration* 88, 92-3.

An ‘overarching purpose’ for the courts

In the words used by the Attorney General in his Second Reading speech, the Bill seeks to introduce:⁵¹

[A] uniform statutory statement to define the overarching purpose of the courts, which is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute ... The courts will be required to give effect to the overarching purpose when exercising powers or interpreting their powers.

The “Overarching Purpose” is set out in clause 7:

- (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.

The Court is to exercise its powers to achieve the “Overarching Purpose”.⁵²

The Court’s powers to further the overarching purpose are set out in clause 9:

- (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—

⁵¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 24 June 2010, 2608, Mr Hulls (Attorney-General).

⁵² *Civil Procedure Bill 2010* (Vic), clauses 8 and 9.

- (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.

Obligations applying to parties, lawyers, and litigation funders

Notably, when the Bill is enacted, ‘Victoria will be the first Australian jurisdiction to implement statutory conduct obligations that apply not only to lawyers, but to all participants who have the power to influence the course of civil litigation’.⁵³

Clause 34 of the Bill prescribes a broad general obligation upon ‘persons involved in a civil dispute’ to ‘take reasonable steps ... to resolve the dispute by agreement or clarify and narrow the issues in dispute’.

Significantly, ‘the Bill contains an exemption for Corporations Law matters in recognition of the prescriptive nature of many such proceedings’.⁵⁴ Furthermore, the Bill provides the courts with a general power to exempt classes of civil proceedings from compliance with the pre-litigation requirements. In addition the Bill provides the courts with a rule making power to design specific pre-litigation processes for certain types of cases

Obligations on parties and lawyers to certify adherence to pre-litigation requirements and overarching obligations

Part 4.1 of the Bill includes a series of clauses that require certifications that (i) parties have complied with the pre-litigation requirements (or if these have not been complied with, a statement setting out the reasons for such non-compliance is required), (ii) that parties they have read and understood the overarching obligations

⁵³ Ibid 2609.

⁵⁴ Ibid 2610 and see *Civil Procedure Bill 2010* (Vic) clause 32(1)(e).

(to be provided by parties in their pleadings), and (iii) allegations made have a proper basis (to be certified by lawyers in their supporting affidavits).

Once the *Civil Procedure Bill 2010* is enacted, *Aon* will have little practical application as most of the principles found in the case will be embodied in legislation. This has been the experience in New South Wales where the *Civil Procedure Act 2005* has been in place for some years.⁵⁵

Conclusion

There is no doubt that *Aon* was a step in the right direction. However, the case only raises broad principles and leaves their practical application to the courts on a case by case basis. *Aon* does not, on its own facts, provide a useful example for the conduct of the Commercial Court. The type of application made would be likely to receive little sympathy in a managed court list, such as those provided in the Commercial Court.

The importance of *Aon* is in relation to the case management issues that arise every day. Pleadings arguments, particulars disputes and discovery applications are frequent. Applications to extend deadlines are common. It is my view, that no matter how involved a judge becomes in the management of litigation to define the issues, until practitioners and parties do not have incentives (whether they be financial or tactical) to spend time in interlocutory proceedings the problems of delay and expense will not finally be addressed. Professor Zuckerman argues that while litigants have an incentive to use procedural tactics to their own advantage and while lawyers have a financial interest in conducting complicated litigation there will be a tension with the courts in seeking to manage litigation efficiently.⁵⁶ Thus Professor Zuckerman commented:⁵⁷

A system in which the courts continually have to pitch themselves against the professional instincts of lawyers is bound to be inefficient. It can hardly

⁵⁵ Professor Camille Cameron, “New Directions for Case Management in Australia” (2010) 3 *Civil Justice Quarterly* 337, 345.

⁵⁶ A.A.S. Zuckerman, “Reform in the Shadow of Lawyers’ Interests” in A.A.S. Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure – Essays on ‘Access to Justice’* (Clarendon Press, 1995) 61, 62-67.

⁵⁷ *Ibid* 68.

be denied that the judicial task of controlling litigation is bound to be easier when its objective is shared by practitioners, and much harder when the court's aim runs counter to that of practitioners

So long as hourly billing is the main form of remuneration for lawyers, the courts can only be partially successful in managing litigation – lawyers and courts will often be at cross purposes.⁵⁸ Although effective case management produces more effective litigation, further efficiencies may flow from a review of the present costs regime and also the basis for the remuneration of practitioners.⁵⁹ These are issues for further careful consideration.

⁵⁸ Ibid 69 and 73.

⁵⁹ Doubts about the efficiency of time billing are well known, see, eg, The Hon J J Spigelman AC, Chief Justice of the Supreme Court of NSW, “Opening of the Law Term 2004” (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004).