I Basic Rules and Principles

1. Costs Shifting

The costs-shifting rule applies in Australia. This is also known as the 'loser pays' rule. Successful litigants can expect an order for reasonable costs, called party and party costs. This is not, however, a complete recovery. There will in most cases be a substantial gap between the costs actually expended by successful parties and the costs they can recover. The irrecoverable portion of the successful party's costs is estimated to be in the range of 40-50%.1 Anecdotal evidence suggests that this figure may vary depending on whether a particular jurisdiction has prescribed scales of costs.2 In the State of New South Wales, for example, where there are no scale costs, the estimates are that successful parties will recover 65% to 85% of their actual costs.3

It is possible in some cases to get an order that costs will be paid on an indemnity basis. This is virtually a full recovery, but such orders are not easy to obtain. There must be some special or unusual feature in a case to justify an order for indemnity

1 In Re Wilcox; Ex parte Venture Industries Pty Ltd (1996) 141 ALR 727, 732 (FCA), Cooper and Merkel JJ stated that the gap between actual and recoverable costs "has highlighted the conflict between two seemingly irreconcilable objectives. The first is protecting access to justice by only exposing an unsuccessful litigant in the usual course to an order for scale costs on a party and party basis. The second is relieving a successful litigant from the burden of costs which the litigant should not have been required to incur."

2 Scales of Costs are prescribed amounts for court fees and other expenditures, usually contained in schedules or appendices to Rules of Court. There are discussed in more detail below, Part XX.

costs, such as delay or non-compliance on the part of the losing party. There are also provisions in the procedural rules relating to formal settlement offers that provide for an indemnity costs order where a defendant refused a reasonable settlement offer. In the State of Victoria, for example, if a defendant in a personal injury case rejects the plaintiff’s settlement offer, and the plaintiff does as well or better at trial than the offer, the usual order will be for costs to the plaintiff on an indemnity basis.4

It is not easy to discern the first principles on which the loser pays rule is based. The power to make costs orders is given to Australian judges by statute.5 They have a wide discretion in costs matters but have long accepted the conventional view that a successful defendant has “in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs”...6. There is a particular view of fairness informing some of the justifications for the rule - it would be unfair for a successful plaintiff whose claims have been vindicated or for a successful defendant who had no real choice but to incur the cost of defending the claim, to have to absorb the litigation costs.

But of course the fairness arguments cut both ways. The costs shifting rule has also been described as “a crude exclusion device the burden of which falls disproportionately on individuals and community groups which do not have the same deep pockets as governments and corporations.”7 In its 1995 report on costs shifting the Australian Law Reform Commission stated that submissions made during the consultation process indicated that the costs shifting rule is most likely to deter “people who may suffer substantial hardship, such as the loss of their home, car or livelihood, if required to pay the other party’s costs, and people or organisations involved in public interest litigation who have little or no personal interest in the matter.”8 This view is shaped less by ideas of adversarial contest, reward and vindication and more by ideas of access to justice and to the courts.

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4 Supreme Court General Civil Procedure Rules 2005, Rule 26.08(2). Such rules typically distinguish between personal injury and other cases. If the claim is not one arising out of death or bodily injury, the plaintiff will get indemnity costs from the date of the offer of compromise (not all costs).
5 See for example s. 43(1) of the Federal Court Act.
6 See Viscount Cave LC in Donald Campbell & Co v. Pollack, In Ritter v. Godfrey [1920] 2 KB 47 Sterndale MR described “such a settled practice of the courts” (at 52). Implied in this comment is a view that the practice is so established, an inquiry into first principles is unnecessary.
The cost shifting rule is an entrenched feature of civil procedure in Australia and not likely to be easily displaced. Almost all major reviews of civil justice in Australia have favoured its retention.\footnote{In \textit{ALRC Cost Shifting 1995}, the Australian Law Reform Commission endorsed the loser pays rule but recommended that courts should be able to depart from the rule if "a party’s ability to present his or her case properly or to negotiate a fair settlement is materially and adversely affected by the risk of an adverse costs order." [12.40]. This proposal has not been adopted.}

2. Court Fees

All Australian courts charge fees prescribed by statute.\footnote{See for example \textit{Federal Court of Australia Act 1976 (Cth)}, s.60 and \textit{Federal Court of Australia Regulations 2004 (Cth)}, Schedule 1.} Typical charges are for filing documents in court, issuing a subpoena, using court mediation services, and daily fees for court hearings. Australia does not have a true “user pays” system. The fees charged for these and similar services fall well below the actual cost of maintaining courts. For example, the Commonwealth of Australia reported in 2009\footnote{\textit{Commonwealth Access to Justice Report 2009}},\footnote{\textit{Commonwealth Access to Justice Report 2009}, ch 3, p 45, quoting the Productivity Commission, \textit{Report on Government Services}, 2009. The percentage of recovery varies across federal courts.} that court fees charged by the Federal Court amounted to 9.3 \% of total Commonwealth expenditure on that court.\footnote{VLRC \textit{Civil Justice Review}, above n 8}

3. Gathering Evidence

The costs of gathering evidence in civil cases are borne by the parties. The main method of gathering evidence in civil cases is through the process of discovery, during which the parties exchange documents that are relevant to the issues in dispute and that are not privileged. While there is very little empirical evidence on cost and fee issues in civil litigation in Australia, there is plenty of anecdotal evidence that the most expensive part of civil litigation is the process of discovery. Various case strategies have been adopted to curb discovery expense, including discovery on limited issues, narrowing the definition of “relevance” and using mediation to resolve disputes about discovery that arise during the course of a case. There is no oral discovery, or ‘deposition’, in Australia, although the Victorian Law Reform Commission recommended in 2008 adopting a version of the North American deposition.\footnote{VLRC \textit{Civil Justice Review}, above n 8}
4. Settlement

It is probably safe to estimate that at least 90% of disputes settle. In such cases, the manner in which costs are to be paid can be dealt with either as part of the settlement agreement or in the formal process called taxation of costs. If the parties try to negotiate and agree on an amount for costs as part of the settlement, they will be influenced by what they know would be awarded if the costs were formally taxed. When parties do not agree on what is a reasonable amount for costs, the matter will be resolved by taxation. The parties appear before a court official (various names are used depending on the jurisdiction – e.g., Taxing Master, Associate Judge, Registrar) who reviews the costs being claimed by the receiving party, hears the parties as to the reasonableness of the amounts claimed, and determines the amount to which the successful party is entitled. In some courts this process can be done on paper, without a formal hearing.

II: Exceptions and Modifications

1. Exceptions

Settlement offers - All Australian jurisdictions have rules that encourage offers of compromise. If a party rejects a reasonable settlement offer, and the offeror does at least as well at trial, there will usually be a costs penalty. For example, if a plaintiff in a personal injury case in the State of Victoria makes an offer that the defendant rejects, and if that plaintiff is awarded the same amount or more at trial, she will in most cases get an order for all of her costs of the action on an indemnity basis. If this case had not been a personal injury case, the usual order would be for party and party costs to the date on which the offer was made, and indemnity costs from that date.

Small claims courts and tribunals - There are various tribunals and small claims court in which the norm is that the parties will pay their own costs. Many of these tribunals also encourage self-representation and try to use expedited and simple procedures.

Mixed success - There will be cases in which a party succeeds on some issues but loses on others. In such cases, courts can deprive the 'successful party' of all or a portion of her costs, depending on the relative import of the issues on which she has succeeded and those on which she has failed.

Multiple parties - In a case with multiple defendants, a plaintiff may succeed against one defendant but lose against others. The court has discretion in such cases (1) to order the plaintiff to pay the costs of the successful defendant (and then to recover those costs from the unsuccessful defendant) or (2) to order the unsuccessful defendant to pay the costs directly to the successful defendant.
Public interest litigation - Australian courts have stated unambiguously that there should be no general expectation of a departure from the loser pays rule in public interest cases. However, they have also demonstrated a willingness to exercise their discretion in favour of unsuccessful public interest plaintiffs.14

2. Mandatory Pre-litigation Procedures

Australia has not yet explicitly incorporated any system of pre-litigation procedures similar to the pre-action protocols that operate in England. They have been recommended, however, and it is likely that they will eventually be adopted in some form.15

There is legislation in all Australian states and in the Federal Court that gives judges the right to order the parties to participate in ADR (usually mediation) even if one or more of the parties is unwilling. Mediation has become a very common early step in litigation. There is no requirement, however, that the parties must have formally undertaken mediation or some other form of ADR before they are entitled to commence proceedings.

3. Party Agreements Allocating Costs and Fees

Contractual agreements of the kind described in this question are not common or, if they are, they have thus far remained below the radar.

4. Self-representation

Parties are allowed to represent themselves. Self-representation in superior courts, including at the appellate level, is an issue that has attracted increasing attention in recent years. There is plenty of anecdotal evidence, and some empirical evidence, that the number of self-represented litigants in superior courts has increased. While self-representation is more common in some courts and some types of cases than in others, most superior courts in Australia have had to struggle with the issues it raises and have had to adapt their work practices to accommodate self-represented

14 See Southwest Forest Defence Foundation Inc v. Department of Conservation and Land Management (No 2) [1998] HCA 35 and Ruddock and Others v. Vadarlis and Others [2001] FCA 1865 for a consideration of the issues courts will consider in such cases. The power to make protective costs orders in public interest cases is available in common law and explicitly in the procedural rules in many Australian jurisdictions, but there have been very few such orders. The issues are discussed by Gary Cazalet, Unresolved Issues – Costs in Public Interest Litigation in Australia, 2010 Civil Justice Quarterly

litigants. These courts are designed to deal with cases in which all parties are represented by competent legal professionals. The challenges raised by self-representation in these courts, not only for the litigants themselves but also for judges and court staff, are substantial.

There are various courts and tribunals in which self-representation is encouraged. These tribunals generally use expedited and simple procedures geared to self-represented people. In the Victorian Civil and Administrative Tribunal (VCAT), for example, self-representation is encouraged and costs shifting is the exception rather than the norm. These tribunals have mixed success. At times they are praised for avoiding complexity and the access to justice problems caused by the costs shifting rule. At other time they are criticized for allowing lawyers and experts to dominate and disempowering ordinary citizens.¹⁶

III Encouragement or Discouragement of Litigation

1. Are the rules governing cost and fee allocation designed to encourage or to discourage litigation?

Opinions will differ on whether rules governing cost and fee allocation are designed to encourage or discourage litigation, and whether they have that effect (regardless of their intent). An oft-cited justification for the costs shifting rule is that it keeps unmeritorious cases away from the courts. The risk of an adverse costs order, it is said, acts as a disincentive to potential frivolous litigation.¹⁷ If one accepts this justification, then it seems the rule is meant to discourage litigation of a certain type. However, the costs shifting rule has also been criticized for discouraging meritorious litigation. There are concerns that access to courts for deserving but poor litigants is impeded by the rule. Private market funding options mitigate this to some extent (no win/no fee, commercial litigation funding and pro bono assistance, for example) but not entirely. Either way, then, it seems the costs shifting rule may be a disincentive.

Court fees are probably not substantial enough to discourage much litigation, nor does it seem that they are intended to serve such a purpose. There have been some recent suggestions that we should consider moving to a user pays system in very large, complex cases. This suggestion often arises in the context of discussions about a perceived rise in Australia of ‘mega litigation’. The massive (and in the view of


¹⁷ There is also some judicial comment to the effect that the gap between actual costs and recoverable may be an attempt to encourage settlement and to discourage litigation: Cachia v. Hanes (1991) 23 NSWLR 304, 318 and Singleton v. Macquarie Broadcasting Holdings Ltd (1991) 24 NSWLR 103, 106.
some observers, disproportionate) consumption of court resources required by these cases and the criticisms this has engendered are the reasons why a user pays system is occasionally mooted. When the suggestion is made, it is usually restricted to cases in which large, well-resourced entities are engaged in what is essentially a private dispute.

It is arguable that conditional fee arrangements encourage litigation because they provide access for cases that might not otherwise be brought. One might also say that class actions are encouraged by the fact that only the lead plaintiff, and not class members, bears a risk of an adverse costs orders (the class members are another exception to the costs shifting rule). It is probably also the case that the tribunals and small claims courts that use expedited procedures, encourage self-representation and do not have a loser pays rule encourage litigation, or at least to not discourage people with meritorious cases from pursuing their claims.

The rules regarding offers of compromise, discussed above, are also relevant here. Those rules are intended to encourage parties to make and to accept reasonable settlement offers. The costs penalties that occur where a reasonable offer is refused are intended to encourage acceptance and settlement, and to discourage continued litigation.

2. How much do parties (typically plaintiffs) have to pay up front? Do up front payments deter litigation?

This will vary depending on the litigant, the lawyers, the case and the jurisdiction in which the case will be brought. If the case is being conducted on a no win/no fee basis, then the up front costs will be minimal and may even exclude disbursements. If there is no such arrangement, then the litigants will typically be responsible for their lawyers' fees, charged on an hourly basis, and all disbursements (for example, expert reports, court filing fees, photocopying).

While time billing on an hourly basis is the norm, there are other approaches. Fixed fee agreements for specific services or discrete tasks, such as preparing a will or a contract, are common. Some commercial clients use their market power to demand alternatives to hourly billing, and law firms have responded to this market demand by bidding for legal services. This can be in the form of an agreed amount for a project or for parts of (or events within) a project. The Commonwealth Access to Justice Report 2009 notes the market power of the government as a consumer of legal services (in 2007-8 Commonwealth agencies reported an expenditure for legal services of over $500 million) and recommends that the Government use that power to require lawyers to bill on an event basis. This recommendation is generally consistent with complaints that time billing encourages inefficiency. The

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18 Ch 9, p 120
19 Ch 9, pp 127-128
recommendation to require more event billing instead of hourly billing is not a giant leap. It is consistent with the trend among some commercial entities to demand alternative billing models.\textsuperscript{20}

Where there is no special arrangement such as a conditional fee agreement, the client is responsible for paying all fees for legal services and disbursements as they arise.

It is likely that such expenses would deter some litigation. There are many people who, although they might have a deserving case, are unable to fund litigation without a conditional fee arrangement. While lawyers in a small or mid-size suburban firm will charge less than lawyers in a large commercial law firm, even at $150 per hour it would not take too long (except in very straightforward cases) for this amount to become prohibitive for many people. This would be exacerbated by the risk of an adverse costs order. It is arguable that this risk (of an adverse costs order) is even more of a deterrent than the lawyer’s fees and other expenses associated with litigation.

\textbf{IV Determination of Costs and Fees}

Court costs are typically set out in Schedules or Appendices attached to the Rules of the various courts. We can consider the Supreme Court of Victoria as an example. The most recent costs Schedule for that Court indicates that a sum of $272 is allowed to institute or defend any proceeding or appeal and an amount of $41 is allowed for review of court documents received from another party. A review of these amounts in previous Schedules reflects very little overall change. The corresponding amounts for 2006 were $235 and $36. Other amounts are set for filing documents with the court, witness court attendance fees (including experts) and drafting and reviewing letters.

Lawyers’ fees are governed by legislation and are generally determined by the market. The relevant legislation in the State of Victoria, for example, is the Legal Profession Act 2004.\textsuperscript{21} This legislation contains onerous disclosure obligations regarding fee and billing arrangements. It does not, however prescribe or limit the amounts lawyers can charge their clients for fees or the billing methods they should use. Fee agreements between lawyers and their clients can be set aside if they are unfair or unreasonable, and clients have the right to demand formal taxation if they are dissatisfied with the bill.

If a case does not settle and the successful party receives an order for costs, the actual amount of costs will be resolved either by agreement between the parties or

\textsuperscript{20} C. Cameron, \textit{Report for Comparative Project on Litigation Costs and Funding Systems – Australia}, forthcoming, XXX, Hart Publishing

\textsuperscript{21} The equivalent legislation in New South Wales is the Legal Profession Act 2004
in a formal process called taxation of costs. In a taxation of costs on a party and party basis, the test is reasonableness. The official presiding will review the Bill of Costs submitted by the receiving party and will hear arguments at the taxation regarding any items in dispute. That official will then make the final determination. As stated above, it is possible in some jurisdictions to complete this process on paper and without the need for a formal appearance before a Registrar or Taxing Master.

V Special Issues

1. Success-oriented Fees

Lawyers in Australia are prohibited from charging contingency fees. Some observers have described as anomalous the fact that commercial litigation funders can charge on a contingent fee basis while lawyers cannot, but there does not seem to be any impetus for reform. There is a provision in the Federal Court class actions legislation which arguably gives a judge the discretion to authorize payment to class lawyers on a contingent fee basis, but to this author’s knowledge no such request has yet been made.

No win-no fee (conditional fee) arrangements are common. Success (uplift) fees are allowed. The percentage uplift that is permitted varies. In the State of Victoria, for example, an uplift fee of 25% is allowed, although not on unpaid disbursements.

2. Sale of Claims

Selling claims in the manner contemplated by this question is not a feature of civil litigation in Australia. The role of commercial litigation funders in Australia is increasing, but they do not buy claims. In a typical case commercial litigation funders enter into an agreement with the funded party. That agreement contains terms regarding the degree of control the funder will have, the circumstances in which a funder can withdraw from the proceeding, the responsibilities assumed by the funder for litigation costs, and how the funder will be paid in the event of success. Commercial litigation funders assume the risk of loss, including an adverse costs order, but the claim belongs to the plaintiff (or the class, represented by the lead plaintiff). The role of commercial litigation funders in Australia is discussed in more detail below, Part IX.

3. Class Actions and Aggregate Litigation; Other Special Cases

A substantial percentage of class action litigation is Australia is securities class actions. Most are funded by commercial litigation funders. They do a rigorous risk analysis because of the burden they take on when they agree to fund such a case.

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especially security for costs and the risk of an adverse costs order. In exchange they
are paid on a contingency basis, usually in the vicinity of 30-40% of the damages
award. Not all class actions are funded in this way. In the recent Vioxx litigation, for
example, the class lawyers conducted the case on a no win-no fee basis.

The lead plaintiff in a class action, but not the class members, is liable for the
defendant’s costs if the claim fails.

VI Legal Aid

Almost all of the available legal aid funding in Australia is used in criminal and
family cases. It is extremely difficult to obtain legal aid funding for a civil case. It is
estimated in the Commonwealth Access to Justice Report 2009 there has been a
reduction of 78% in the amount of legal aid funding available for civil matters since
1995-6. The Commonwealth has relied on the services of services for at least half of
all grants of legal aid. A 2006 study revealed that many private practitioners were
no longer willing to provide these services because the fees paid were about 50% of
the fees available in the private sector.23

The Commonwealth Access to Justice Report 2009 thus conveys a grim picture,
describing “a significant and continuing shortfall in legal aid for civil law
matters”. It does not, however, appear to recommend an increase in
government funding for civil legal aid as a solution. Its preferred strategies
seem to be to reapportion existing resources in a way that responds to
citizens’ needs for basic information and for non-litigation dispute resolution
options.24

VII Examples

It is very difficult either to state or to “provide a good faith estimate of” the sum total
for both sides of litigating a case to final judgment. The combined effects of the costs
shifting rule and hourly billing of fees make it very difficult to predict what the total
sum for costs and fees will be. This difficulty increases as the complexity of the case
increases. Any response to these questions would necessarily be guesswork and
would have so many caveats attached that it is probably ill advised and
counterproductive to offer the estimates. I will offer a few observations. The first
example supposes a case in which the claim is for $1000. The only place where such
a claim could conceivably be brought is in a small claims jurisdiction. These exist in
various forms throughout Australia. They all generally use expedited procedures
and many encourage self-representation and tend away from the costs shifting rule.

23 TNS Social Research, Legal Aid Remuneration Review: Final Report 2007, quoted in Commonwealth
Access to Justice Report 2009, above nxx, at fn 125
24 C. Cameron, Litigation Costs and Funding Systems Australia, book chapter forthcoming June 2010,
in Hart Publishing,
IX Other Issues

1. Commercial Litigation Funding

As some comments above indicate, commercial litigation funders have a significant and growing presence in Australia. There are at least 5 companies operating in Australia, and recent signs are that Canadian, American and European funders are interested in the Australian market. The need for commercial litigation funders exists primarily because of the lacuna in the market created by the costs shifting rule and the prohibition against lawyers charging contingency fees. The role of LFCs in cases other than insolvency cases was, until recently, uncertain. Their legitimacy was challenged on the basis of maintenance (improperly encouraging litigation), champerty (funding a third party’s litigation for profit) and abuse of process, and there were conflicting judicial decisions. In 2006 the High Court of Australia resolved the conflict by endorsing the role of institutional litigation funders. The trial judge had accepted arguments that the litigation funding agreement was invalid because it amounted to ‘trafficking in litigation’. The Court of Appeal reversed the trial judge’s decision and described a need for a change in the attitude towards litigation funding. In the Court of Appeal, Mason P stated:

These changes in attitude to funders have been influenced by concerns about access to justice and heightened awareness of the costs of litigation. Governments have promoted the legislative changes in response to the spiralling costs of legal aid. Courts have recognised these trends and the matters driving them. ‘Ambulance chasing’ still has negative connotations in many quarters, but it is now widely recognised that there are some types of claims that will simply never get off the ground unless traditional attitudes are modified. These include cases involving complex scientific and legal issues. The largely factual account in the book and film A Civil Action has demonstrated the social utility of funded proceedings, the financial risks assumed by funders, and the potential conflicts of interest as between group members in mass tort claims propounding difficult actions against deep-pocketed and determined defendants.

The High Court endorsement in Fostif of commercial litigation funding removed uncertainty for commercial litigation funders and has led to the growth of a

25 The key cases are discussed in Fostif v. Campbells Cash and Carry Pty Ltd [2005] NSWCA 83.
26 Campbells Cash and Carry v. Fostif [2006] HCA 41
27 Fostif v. Campbells Cash and Carry [2005] 63 NSWLR 203. The appeal to the High Court failed on this ground, but was successful for other reasons.
commercial litigation funding market in Australia. But pressing questions about the proper regulation of commercial litigation funding remain. In the recent *Brookfield Multiplex* decision,[28] the Full Court of the Federal Court ruled (2-1) that the arrangement between the commercial litigation funder, the law firm representing the class, and the members of the class was a managed investment scheme as defined in the *Corporations Act*.29 One result of this decision is that the arrangement should have been registered under the relevant provisions of the *Corporations Act*. Another result is that its impact was felt beyond the boundaries of this particular case. There were other class action proceedings underway which had not been registered as managed investment schemes. The Australian Securities and Investments Commission intervened to grant an exemption (albeit limited in time to 30 June 2010) to those class actions affected by the decision. Discussions are now underway to determine how best to respond to this decision and to regulate commercially funded class actions.

One possible outcome of *Brookfield Multiplex* is that the matter will be determined by the High Court. A more likely outcome is that the Commonwealth will change the law to exclude funded class actions from the definition of a managed investment scheme. Whatever the outcome, the case highlights the ad hoc way in which commercial litigation funding has been developing in Australia. In 2006, regulation of commercial litigation funders was explored by the Standing Committee of Attorneys General,[30] with no specific regulatory outcomes. Nothing has been done since that time to put in place an appropriately designed regulatory framework.

2. The Fast Track in the Federal Court of Australia

This is a case management innovation similar to those in many other common law jurisdictions. The fast track (also referred to as the ‘rocket docket’) uses expedited procedures such as streamlined pleadings, abbreviated discovery and an early trial date. One solicitor has estimated that a client whose case was dealt with in the fast track saved about 50% of the costs that would otherwise have been incurred.

3. *AON v. ANU*[31]

Case management jurisprudence and practice in Australia have since 1997 been dominated by the decision of the High Court in *Queensland v. JL Holdings*.[32] That case

[28] *Brookfield Multiplex Limited v. International Litigation Funding Partners Pte Ltd (No 2) [2009]* FCAFC. This is a representative proceeding (i.e., a class action) by shareholders against Brookfield Multiplex for damages for losses allegedly caused by the company’s belated disclosure of cost problems related to the construction of the Wembley Stadium.

[29] *Corporations Act 2001* (Cth)


[31] [2009] HCA 27
has stood for the principle that while case management considerations are relevant on an application to amend a pleading, they should never be allowed to prevail over justice on the merits. It endorsed the “costs as panacea” philosophy and a very generous approach to non-compliance and applications for amendments and adjournments. *JL Holdings* has been described as having had “a chilling effect” on case management, especially in commercial cases. In *AON v. ANU* the High Court overruled *JL Holdings* and discredited the narrow approach to judicial case management that it had come to represent. An analysis of post-*AON* cases in Australia shows that the case is having the desired effect on judicial case management and that judges are now empowered to deal more robustly and strictly with non-compliance. Applications for amendments and adjournments that would formerly have been granted as long as any prejudice caused (for example, delay) could be compensated with a costs order, are now being rejected.

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33 *Black and Decker (Australasia) Pty Ltd v. GMCA Pty Ltd* [2007] FCA 1623 (FCA), Finkelstein J, [3]

34 The post-*Aon* jurisprudence is discussed in Cameron, *New Directions*, above note 32.