

Aon Risk Services Australia Ltd v ANU
(2009) 239 CLR 175:

What does this mean for litigation and
how will it affect trial preparation?

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This paper takes a practical approach to the scenario presented in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 (*Aon*), outlining the problems created when significant changes to pleadings are allowed, as at the commencement of proceedings, during the discovery process and thereafter. Coming from a solicitor's perspective, this paper is intended to serve as a reminder of the impact of altered pleadings on solicitors and clients alike, and offers some practical guidance to practitioners in relation to trial preparation and client management.

It is to be hoped that, in light of the decision of the High Court in *Aon* and the increased focus on case management principles, many of the problems faced by solicitors in dealing with changes to pleadings, as outlined below, will soon be a far less regular occurrence in litigation.

1. Beginning proceedings and trial preparation

Ultimately, clients seek, and solicitors and barristers aim to deliver, a cost and time-effective process.

From the point of view of parties potentially seeking to be allowed to alter pleadings, the lesson to take from *Aon* is the importance of efficient and effective trial preparation, which, if done successfully, will mean that sufficient groundwork will have been completed at the outset of the matter so as to accommodate the inevitable subsequent small-scale changes to the evidence. At the beginning of proceedings, it is crucial to take in as many relevant documents as possible, so that the matters in dispute can be identified. A chronology of events is then prepared, followed by an issues list, and an evidence matrix, to map where the evidence lies. From such documents, appropriate pleadings can be drafted.

While plaintiff and applicant clients inevitably seek that proceedings be issued immediately, where possible, given client cost constraints, it is well worth taking extra time at the beginning of a matter to formulate comprehensive and considered pleadings which will not require significant alteration throughout the life of the proceedings, saving time and effort and circumventing potential disputes about whether such changes should be permitted.

The decision in *Aon* also reflects the problems created for parties on the receiving end of significantly altered pleadings, when allowed. Documents such as the issues list and evidence matrix are created with close reference to the pleadings. Where there is a



substantial shift in the number and nature of live issues between the parties, such as where pleadings change significantly, the tasks performed and documents created at the beginning of a matter may need to be significantly reworked, or perhaps even repeated from the beginning. This involves significant duplication of effort, which wastes both time and costs.

2. Discovery

Discovery is an area in which changes to pleadings can create significant delays, expense and frustration.

The discovery process is often complex and involved, and consequently, costly and time-consuming. Decisions will have been made at the outset of the discovery process about how it is to proceed, such as in relation to whether discovery take place by way of hard copy or electronic exchange, or the amount of personnel and time allocated to the process. These decisions are made with regard to the pleaded case, and the applicable standard of discovery.

There are potentially four different standards to be applied in relation to discovery, depending on whether a particular matter is being heard in the Supreme Court, the Commercial Court, Federal Court, or the Federal Court Fast Track. Some of the tests are broader than others, but all of them define the discovery that is required to be made by reference to the issues raised in the pleadings.

In the Supreme Court, rule 29.2 of the *Supreme Court (General Civil Procedure) Rules 2005* provides that:

- (1) Where the pleadings between any parties are closed, any of those parties may, by notice for discovery served on any other of those parties, require the party served to make discovery of all documents which are or have been in that party's possession relating to any question raised by the pleadings.

In the Commercial Court, the applicable test as to what documents are discoverable can vary, and are highly dependent on the state of the pleadings at that point, as paragraph 12.6 of the *Green Book* (Practice Note 1 of 2010) states that:

Parties are encouraged to agree upon orders for discovery and to consider whether limited categories of discovery should be exchanged.

In the Federal Court, under rule 15.2 of the *Federal Court Rules*:

(3) ...the documents required to be disclosed are any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:

- (a) documents on which the party relies; and
- (b) documents that adversely affect the party's own case; and
- (c) documents that adversely affect another party's case; and
- (d) documents that support another party's case.

For Federal Court Fast Track matters, under paragraph 7.1 of Practice Note CM 8:

Except where expanded or limited by the presiding judge, discovery if ordered in proceedings to which the Fast Track Directions apply will be confined to documents in the following categories:

- (a) documents on which a party intends to rely; and
- (b) documents that have significant probative value adverse to a party's case.

Perhaps most confusingly of all, some Judges prefer to manage matters which are not formally heard by the Commercial Court, or listed in the Federal Court Fast Track list as though they were so heard. This can produce genuine and substantial confusion as to which discovery rules apply. While a Court may be of the view that, ultimately, parties know the relevant documents and the case which is to be put or met, in reality, this is simply not always the case. Appropriate discovery and recognition of the pleadings is a vital element of establishing or defending a case.

Discovery begins with an approach to the client, to begin the process of identifying and locating all documents of relevance. Once collated, the documents then need to be reviewed to determine what needs to be ultimately produced, which involves culling the non-relevant documents and selecting relevant documents. Documents may be redacted, or marked as privileged. Documents are also coded, or marked, as being key documents, or relevant to particular issues or witnesses. These coded documents are often referred to at a later stage in the proceedings to assist in the preparation of witness and expert

bundles, cross-examination bundles and court books. A list of discovered documents is then generated, the client's documents prepared for inspection, and the exchange of documents subsequently takes place.

The document review process is always undertaken by reference to the issues in the case, as identified through the pleadings. Where pleadings change significantly, the entire discovery process is repeated from the beginning to accommodate the new pleadings, with the added burden of, often, a de-duplication process, usually involving a manual comparison, to ensure that documents which have previously been discovered are not provided a second time.

Such additional discovery is particularly cumbersome where, initially, limited discovery was required, such as in the case of Fast Track proceedings, or where limited categories of discovery had otherwise been agreed upon between the parties. In these cases, the often large amount of material considered not relevant on the initial review will need to be examined again to determine its relevance to the new case, as pleaded, a lengthy and costly process.

3. Evidence and research

Changes to a statement of claim necessitates consideration as to whether further evidence is required to address any new issues that are raised, and trial preparation is inevitably set back. Generally, the defence will be required to be amended, and further legal research and the preparation of additional affidavits or witness statements may be needed. Interlocutory disputes may arise. The involvement of further lay witnesses and perhaps even expert witnesses may be necessary, and further preparation may be required for any new witnesses of the amending party.

4. Impact on solicitors

Despite an apparently commonly held view by judges and barristers, law firms, even large ones, do not have endless resources to allocate to pre-trial preparation. Whilst large litigation departments are frequently staffed by a reasonable number of highly competent, hard-working and diligent lawyers, their time is often fully allocated to their current

commitments. Accordingly, when court orders are made that additional discovery, amended pleadings or witness statements be completed quickly, substantial after hours and weekend work is usually required, which can place a significant burden on solicitors.

5. Impact on clients

Litigation is a stressful experience, even for those in the corporate world, and very few clients are seasoned and experienced litigants. Despite an oft held belief to the contrary, most large corporations are not 'litigation ready', and the work required to prepare for any substantial piece of litigation is as large for them as any other company. Client unfamiliarity with the legal process adds time and cost, as solicitors are required to explain court procedures and the tasks being undertaken.

The *Aon* decision noted that losses created through delay are often not compensable by an order of costs. This is particularly true in relation to commercial parties. As observed by Justice Finkelstein in 2007 in *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623, commercial litigants often suffer losses that are not able to be calculated, or are not directly pecuniary in nature, with his Honour giving the example of the costs of employee time diverted from the firm's business and into litigation. Outstanding litigation can also inhibit companies from taking action, where the legality of such action is being disputed. This creates opportunity costs that continue to grow for as long as the matter remains unresolved.

Furthermore, individuals involved in proceedings where pleadings change may be required to assist in searches for documents, the preparation of further affidavits or witness statements, or they may be required to wait longer than anticipated for resolution of the proceedings. Delay resulting from changes to pleadings also prolongs the inconvenience and pressure placed on individuals involved in the proceedings.

Lastly, as is well known but frequently overlooked, the substantial gap between costs recovered under typical costs orders and a party's actual expenses mean that the additional costs incurred by a party in responding to another party's altered pleadings are rarely recouped in their entirety. Currently, only around 40 to 60 per cent of party/party costs are recoverable, with a slightly higher proportional obtainable on a solicitor/client basis. While judges and barristers are notoriously disinterested in this area, it is one of vital concern to clients and often impacts the litigation strategy adopted.

6. Practical tips

Communication with the client is important. Taking detailed instructions from the client early in the proceedings, and speaking with them regularly as the matter progresses, enables solicitors to properly understand the issues in the proceeding, and to formulate and assign the tasks required to be undertaken by solicitors and counsel. Regular communication also enables solicitors to manage client expectations as to the likely timeframe and costs of litigation.

It is also good practice in commercial matters to identify personnel who can be of help within a client organisation. Having these contacts will expedite the response process when pleadings and case emphasis changes. Having an understanding of where relevant documents may be sourced from can also aid in the process.

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