

Aon Risk Services Australia v Australian National University (2009) 258 ALR 14; (2009) 83 ALJR 951; [\[2009\] HCA 27](#); 5 August 2009

What is the case about?

This case concerns a dispute between Australian National University (ANU) and its insurance broker, Aon Risk Services Australia (Aon), over leave to amend ANU's statement of claim. Indicating concern about delays in the Australian court system, the High Court allowed the appeal and expressly overruled one of its previous judgments.

The Court said:

- Judicial Officers must now consider the wider public interest in the efficient use of limited court resources when deciding whether to grant applications to amend pleadings;
- Parties are not entitled to raise any arguable case at any stage of proceedings, subject only to payment of costs;
- Amendments that produce delay impact on the entire court system and affect parties who wish to use the court system.

Who does this decision affect?

While this decision primarily affects the civil jurisdiction and relies heavily on the ACT Court Rules, it is arguably relevant in all cases when a party seeks an indulgence from the court without adequate justification or when granting the application will prejudice other court users by delaying the resolution of cases.

The decision

The High Court's decision involves three elements of note:

1. The High Court expressly overruled statements in its previous decision of *Queensland v JL Holdings*¹ that case management concerns are only relevant in exceptional circumstances. Instead, courts must always consider the public interest in the efficient use of court resources when determining whether to grant indulgences such as amendment of pleadings and adjournments.
2. The Joint Judgment (Gummow, Hayne, Crennan, Kiefel and Bell

¹ (1997) 189 CLR 146.

JJ) held that the phrase “the real issues in the proceeding” in the ACT court Rules means the issues raised in the pleadings at the time of an application for amendment. The court may look beyond the pleadings in some cases, provided the relevant dispute or controversy exists at the time of the application for amendment.²

3. French CJ and the Joint Judgment held that when faced with an argument that a court must allow an amendment or face a multiplicity of proceedings, a court may critically examine whether a party *could* bring subsequent proceedings against the defendant. Various doctrines exist that prevent a party from seeking to bring subsequent proceedings when it fails to raise a matter, including limitation periods, abuse of process doctrine and *Anshun*³ estoppel.⁴

Background

On 18 January 2003, the Canberra bushfires destroyed the Mt Stromlo Observatory owned by ANU. ANU’s policy of insurance distributed the risk between three insurers.

After unsuccessful negotiations, ANU commenced proceedings in the Supreme Court of the Australian Capital Territory against the insurers, who filed defences arguing that:

1. ANU understated the value of the premises; and
2. The policy of insurance did not cover certain property.

In response to the defences, ANU filed an amended statement of claim joining its insurance broker, Aon, as fourth defendant. The amended statement of claim raised an alternative claim against Aon that it was negligent in failing to arrange renewal of insurance coverage for the omitted property.⁵

The proceedings were set down for a 4-week trial commencing on 13 November 2006. On 15 November, ANU and the insurers obtained consent orders following a successful mediation on the first two days listed for the trial. ANU then sought leave to amend its statement of claim against Aon to allege a different contract of service and add a claim that Aon was negligent by failing to state the correct value of the properties.

² Joint Judgment at [71].

³ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

⁴ French CJ at [33], Joint Judgment at [86].

⁵ Joint Judgment at [39].

Heydon J was especially critical of the trial judge and ANU's handling of this application. A series of adjournments to allow ANU and Aon to prepare arguments consumed the whole 4 weeks set aside for the trial. The trial judge then reserved judgment for 10 months before granting leave to amend. Aon appealed to the Court of Appeal, who dismissed the appeal (Lander J dissenting) after reserving judgment for 6 months.

Relevance of public interest factors and overruling of JL Holdings

French CJ and the Joint Judgment both discussed the relevance of case management concerns before overruling the previous statement in *Queensland v JL Holdings* that case management principles can only apply in an extreme case to prevent a party from litigating a fairly arguable issue.

In his judgment, French CJ:

- Analysed the history of the amendment rules and relevant authorities;⁶
- Held that courts had previously given great weight to the notion of the adversarial system, which leaves the conduct of litigation to the parties; and
- Held that changing court practices now recognise the importance of reducing costs and delay, that courts must consider “the public interest in the proper and efficient use of public resources” and that granting applications without adequate explanation or justification may reduce public confidence in the legal system.⁷

The Joint Judgment expressed the same conclusions as French CJ in different language. Their Honours:

- Considered statements in the ACT court Rules that the powers in the rules must be exercised to resolve disputes in a just and timely manner at an affordable cost;
- Held that the purpose of the Rules broaden the notion of a “just resolution” and that while a party must have an adequate opportunity to plead its case, courts may limit re-pleading that causes unwarranted delay and costs. Parties do not have a right to raise any arguable issue, subject only to payment of costs. Courts must now recognise that costs cannot cure all forms of prejudice, especially the prejudice to other litigants caused by prolonged adjournments and disruptions to the court

⁶ See paragraphs [9]-[23].

⁷ French CJ at [23]. See also *Sali v SPC Ltd* (1993) 116 ALR 625 at 629.

lists;⁸

- Held that the fundamental purpose of case management principles is to do justice to all litigants and that limiting the relevance of case management concerns to extreme cases “implies that considerations such as delay and costs can never be as important as the raising of an arguable case and it denies the wider effects of delay upon others”;⁹
- Held that parties must explain the reason for any delay in applying for an amendment. This explanation should demonstrate that the application is brought in good faith and identify the circumstances giving rise to the application. The court should weigh those circumstances against the effect of delay and the objectives in the court Rules. This explanation should be on admissible evidence and statements by counsel from the bar table are not sufficient.¹⁰

Identification of “real issues” in a proceeding

The Joint Judgment held that the “real issues” in a proceeding are the issues raised in the pleadings before the court grants a proposed amendment. Applying this principle to the facts of this case, the value of the properties was an issue only between ANU and the insurers, and not between ANU and Aon. Indeed, ANU was on notice that the valuation was an issue when the insurers filed their defences and, if it wished to expand its case against Aon, it should have done so at that time. It could not rely on the requirement in r501 of the ACT court Rules that require the court to allow an amendment “for the purpose of deciding... the real issues in the proceeding”.

Avoiding a multiplicity of proceedings

While it was not necessary to reach a firm conclusion, both French CJ and the Joint Judgment doubted that ANU could bring subsequent proceedings against Aon if the court refused leave to amend the statement of claim. This would depend on whether ANU could abandon its claim against Aon without affecting its right to bring a later claim. Limitation periods, the doctrine of abuse of process and *Anshun*¹¹ estoppel might apply in future proceedings between ANU and Aon.

⁸ French CJ at [25], Joint Judgment at [95] - [99], [111], [114].

⁹ Joint Judgment at [95].

¹⁰ Joint Judgment at [102] - [106].

¹¹ *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

Timely resolution of commercial proceedings

Heydon J focussed his judgment on the facts of the case and the application of the court Rules before turning his attention to the conduct of the parties. His Honour was critical of the profound delay affecting these proceedings in contrast to the importance of speedy resolution of commercial litigation and concluded with a grim assessment of modern litigation:

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.¹²

What is the effect of relevant Victorian court Rules?

Appendix A sets out the court rules. The two sets of rules are close, but not identical. Given that all judges in the High Court paid close attention to the terms of the *Court Procedure Rules 2006* (ACT), it is necessary to consider whether these differences affect the application of the principles discussed in this case to Victorian courts.

Rule 21 of the ACT court Rules specifies the objectives of the rules and the purpose courts should achieve when applying the rules. In Victoria, the analogous provisions are r1.14 of the higher court rules and r1.19 of the Magistrates' Court rules. All three sets of rules refer to considerations of timeliness and cost efficiency in the exercise of the court's powers. On this basis, it is likely that Victorian courts will need to consider wider public interests when determining whether to grant a party leave to amend a document.

In contrast, the ACT contains two separate rules concerning when the court may grant leave to amend a document. Rule 501 sets out circumstances where the court must grant an amendment while r502 grants a general power to permit amendment. In Victoria, r36.01 of the higher court rules and r35.02 of the Magistrates' Court rules give the courts general powers to amend documents for three specified purposes. These purposes are almost identical to the circumstances where amendment is mandatory in the ACT. However, the Victorian rules do not contain a general amendment power that is analogous to

¹² Heydon J at [156].

r502 of the ACT Rules. In addition, the higher court rules contain the definition of “question”:

question means any question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the Court, by any party or by any person not a party who has a sufficient interest.¹³

This definition includes questions raised other than by the pleadings and may mean that, in Victoria, the “real question in controversy” is not defined solely by reference to the statement of claim prior to amendment. Courts will need to resolve this issue in the future and may need to consider whether an application for leave to amend a document is within the terms of the relevant court rules.

What is the effect of the *Victorian Civil and Administrative Tribunal Act 1998*?

Under s98 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Tribunal:

- (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

Previous decisions by the Tribunal have held that the amendment power in s127 may be exercised in accordance with the same factors that courts consider when determining whether or not to amend claims, along with any relevant objectives of the relevant enabling statutes.¹⁴ The tribunal must focus on “achieving the fair resolution of the *substance* of the issues before it.”¹⁵

The increased importance of the speedy resolution of proceedings shown in *Aon v ANU* may be relevant for the tribunal when exercising its powers under s127. However, any change in practice in this area must be consistent with the statutory obligations in s98.

Summary of decision

This decision significantly affects the exercise of discretions concerning the management of cases. It demonstrates that the High Court is

¹³ *Supreme Court (General Civil Procedure) Rules 2005; County Court Civil Procedure Rules 2008* r1.13.

¹⁴ *Yim v State of Victoria* [2000] VCAT 821. See also *Burrows v State of Victoria* [2002] VCAT 1655.

¹⁵ *Woodcock v Northern Grampians SC* [2005] VCAT 1813 (emphasis in original).

concerned about an unduly permissive attitude to amendments that add to delays affecting the Australian court system. Courts should not allow parties to radically change the substance of their cases late in the day. Now, courts must consider whether a proposed amendment causes unacceptable costs on another party or causes delay to other court users.

Appendix A

Purpose of the rules

Australian Capital Territory	Victoria
<p>ACT Rules – r21</p> <p>(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.</p> <p>(2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving—</p> <p>(a) the just resolution of the real issues in the proceedings; and</p> <p>(b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.</p> <p>(3) The parties to a civil proceeding must help the court to achieve the objectives.</p>	<p>Victorian Supreme Court and County Court Rules – r1.14</p> <p>(1) In exercising any power under these Rules the Court-</p> <p>(a) shall endeavour to ensure that all questions in the proceeding are effectively, completely, promptly and economically determined;</p> <p>(b) may give any direction or impose any term or condition it thinks fit.¹⁶</p> <p>Victorian Magistrates’ Court Rules – r1.19</p> <p>(1) The overriding objective of these Rules is to enable the Court to deal with a case justly.</p> <p>(2) Dealing with a case justly includes, so far as is practicable—</p> <p>(a) effectively, completely, promptly and economically determining all the issues in the case;</p> <p>(b) avoiding unnecessary expense;</p> <p>(c) dealing with the case in ways which are proportionate to—</p> <p>(i) the amount of money involved;</p> <p>(ii) the complexity of the issues;</p> <p>(d) allocating to the case an appropriate share of the Court’s resources, while taking into account the need to allocate resources to other cases.</p>

¹⁶ *County Court Civil Procedure Rules 2008* r1.14 is identical.

Amendment Rules

Australian Capital Territory	Victoria
<p>ACT Rules</p> <p>501 <i>Amendment — when must be made</i></p> <p>(1) All necessary amendments of a document must be made for the purpose of—</p> <p>(a) deciding the real issues in the proceeding; or</p> <p>(b) correcting any defect or error in the proceeding; or</p> <p>(c) avoiding multiple proceedings.</p> <p>502 <i>Amendment — of documents</i></p> <p>(1) At any stage of a proceeding, the court may give leave for a party to amend, or direct a party to amend, an originating process, anything written on an originating process, a pleading, an application or any other document filed in the court in a proceeding in the way it considers appropriate.</p> <p>(2) The court may give leave, or give a direction, on application by the party or on its own initiative.</p> <p>(3) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.</p>	<p>Supreme Court Rules – r36.01¹⁷</p> <p>(1) For the purpose of-</p> <p>(a) determining the real question in controversy between the parties to any proceeding; or</p> <p>(b) correcting any defect or error in any proceeding; or</p> <p>(c) avoiding a multiplicity of proceedings-</p> <p>the court may, at any stage order that any document in the proceeding be amended or that any party have leave to amend any document in the proceeding.</p>

¹⁷ See also *County Court Civil Procedure Rules 2008* r36.01 and *Magistrates' Court Civil Procedure Rules 2009* r35.02.