CONSTRUCTION LITIGATION: CAN WE DO IT BETTER?

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In recent years, alternative dispute resolution, most notably mediation, has become a popular way of keeping disputing parties out of the Australian courts. Despite these advances, numerous disputes still end up in litigation. This is particularly true when it comes to complex construction cases. While Australia's focus on mediation is admirable, it has come at the expense of a broader debate regarding litigation reform. In the United Kingdom, where mediation has not been embraced with the same enthusiasm, there have been many innovative reforms to civil procedure rules. In particular, the Pre-Action Protocol for Construction and Engineering disputes is proving to be successful in reducing the amount of litigation and improving the conduct of cases that do proceed to trial. This article considers whether similar civil procedure reforms are warranted in Australia.

I INTRODUCTION

Construction is by its very nature a risky process, and large construction projects often turn out to be Act 1, Scene 1 in a litigation tragedy of Shakespearean proportions.

Construction disputes tend to comprise a matrix of complex technical issues, numerous and varied causes of action, and multiple parties, all of which frequently lead to an inordinately complicated and convoluted litigation process. It is for this reason that some jurisdictions have established specialist courts to deal with these disputes, most notably the Technology and Construction Court ('TCC') in England. It was in the TCC,[1] in October 2000, that an innovative civil procedure change in the form of a Pre-Action Protocol for Construction and Engineering Disputes ('PAP') was introduced.[2] PAP is one of eight specialist pre-action protocols that have been introduced in England.[3]

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1 A Court recognised as being 'the vanguard of judicial procedural innovation': Humphrey Lloyd, 'Construction Defaults: The Approach of the Technical and Construction Court' 17 (2002) *Construction Law Reports (Articles)* 84, 86.

2 PAP was implemented under the new *Civil Procedure Rules 1998* ('CPR'), which govern practice and procedure in the Civil Division of the Court of Appeal, the High Court, and the County Courts. *The Civil Procedure Act 1997* (UK) and CPR – colloquially known as the 'Woolf reforms' – were implemented after a rigorous cost-benefit analysis of litigation undertaken by Lord Woolf, the findings of which were published in Lord Woolf, *Access to Justice, Final Report* (1996).

3 The other pre-action protocols apply to personal injury claims, judicial review cases, defamation claims, professional negligence cases, clinical disputes, disease and illness claims, and housing disrepair cases.

PAP represents a philosophical shift in the way litigation is commenced and conducted. 'It imposes formal structures on the procedures that parties must follow before they are permitted to file a lawsuit.'[4] The intent behind PAP is to move parties in a construction dispute away from the traditional approach of commencing litigation as a first resort, and towards a full consideration of alternative means of resolving their differences. PAP does this by forcing parties to fully investigate the merits of their claims and defences as a condition precedent to filing a lawsuit. Prior to PAP, there was no requirement in the UK that potential litigants thoroughly examine the strengths and weaknesses of their construction claims before issuing proceedings. There is still no such requirement in Australia.

Early reports regarding the impact of PAP in England suggest that it has been successful in reducing the number of construction cases filed, as well as improving the conduct of parties whose cases still end up going to trial.[5]

This article explores whether there is a case to be made for Australia introducing reforms similar to PAP for construction disputes. Section II analyses the exact requirements of PAP, while section III examines the impact PAP has had in the five years since it was implemented. The authors argue in section IV that overall PAP has achieved its objectives of reducing and streamlining construction litigation, and that there are sound arguments for introducing PAP in Australia, albeit in a slightly modified form.

II WHAT IS PAP?

Prior to the introduction of PAP in England, pre-action dialogue between the parties to a construction dispute was limited. In many instances, a party would first learn of a dispute through the receipt of a solicitor's letter, followed by proceedings initiated soon after. This, of course, gave little opportunity for the parties to fully consider the issues before litigation and, in particular, whether the matter could be resolved without recourse to court proceedings.[6] This was due to the fact that control of pre-action dialogue was left in the hands of the parties (and their lawyers), who frequently engaged in tactical gamesmanship[7] and were notoriously adept at pleading prolix, imaginative and often widely exaggerated claims, with little consideration of whether there was evidence to substantiate them.[8]

4 Butterworths, *Halsbury's Laws of England*, vol 37 (at 9 February 2005) 4 Conduct Before Commencement of Proceedings, '1 The Pre-Action Protocols' [203].

5 Cameron McKenna and Caroline Cummins, *The Construction and Engineering Pre-action Protocol* (2003) <www.law-now.com/CS2000/internet/EN/co00home/default.htm> at 2 February 2005. This paper was based on responses from practitioners and judges to a survey evaluating the success of PAP.

6 David de Ferras, *The General Pre-action Protocol Practice Direction* (2003) Taylor Wessing <www.taylorwessing.com/topical/index.html> at 2 February 2005.

7 Dick Greenslade, 'A Fresh Approach: Uniform Rules of Court' in A A S Zuckerman and Ross Cranston (eds), *Reform of Civil Procedure* (1995) 119, 120.

8 Justice Dyson, 'The Future of Civil Litigation: The New Technology and Construction Courts Post Woolf, Or The Official Referees in Sheep's Clothing' (1999) 15(5) *Construction Law Journal* 335, 336.

PAP attempts to address these problems with a 'cards on the table' approach by requiring parties to provide detailed information regarding claims, defences and counterclaims as a condition precedent to initiating proceedings.[9] The obligation to exchange information applies to the facts, arguments and remedies sought or relied on by all parties. The active and detailed communication between the parties at the pre-litigation stage, including the parties meeting at least once to define the issues between them and examine ways in which the claims may be resolved, in whole or in part, increases the potential for settlement without litigation. Where settlement proves impossible, cases are nevertheless more efficiently case managed. If potential litigants do not comply with PAP provisions, the TCC may impose sanctions for breach.[10]

A *Letter of Claim*

The first condition that PAP imposes is that a claimant must serve a Letter of Claim on all potential defendants.[11] The seven matters that must be addressed in a Letter of Claim are set out in Figure 1 below.

Claimant's full name and address.
Full name and address of each proposed defendant.
A clear summary of the facts on which each claim is based.
The basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on.
The nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed.
Where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected.
The names of any experts already instructed by the claimant on whose evidence it intends to rely, identifying the issues to which that evidence will be directed.

Figure 1: Requirements of a PAP Letter of Claim

9 The policy underlying this approach was explained in *Naylor v Western Health* (1987) 1 WLR 958, 967, where Donaldson LJ (as he then was) stated that tactical considerations based on the adversarial system which have no relation to the achievement of justice, cannot be allowed to carry any weight. Justice is not achieved by a war of attrition in which survival is a prize awarded to the party with the greatest determination and the most money. 'Nor is justice achieved by a prize attack, although it can be.' The general rule is that although parties are 'entitled to privacy in seeking out the cards for their hands, once that hand is put together, the litigation is to be conducted with all the cards face up on the table'.

10 CPR rule 44.3(5)(a). PD Protocols, paragraph 2.3 sets out orders which the court may make if, in its opinion, non-compliance has led to the commencement of proceedings which might not have eventuated or has led to costs being incurred that might not otherwise have been incurred. The court also has a general power to impose sanctions under CPR rules 3.8 and 3.9 for failure to comply with Practice Directions. Also see *Mars v Tecknowledge* [2000] FSR 138 and *Paul Thomas Construction v Damian Hyland and Jackie Power* [2001] CILL 1784.

11 PAP, pt 3.

Forcing parties to articulate their claims in this manner prior to commencing proceedings is clearly designed to ensure that not only do defendants have detailed knowledge of the case they will have to answer if the matter does go to court, but also that claimants have fully considered all their claims, the evidence they will need to substantiate them, and how they will address defences already identified by prospective defendants.

One would like to think that parties would, as a matter of course, undertake this sort of analysis and preparation prior to commencing litigation. However, it is clear that all too often in the race to get to court, detailed evaluation of claims, defences and counterclaims is not undertaken until the last possible moment. This strategy of procrastination may save parties some costs in the short term, but it is likely to cost them dearly in the long term.

The requirement that claimants conduct such extensive preparation prior to commencing a lawsuit (and the corresponding increase in preliminary fees and costs) is one of the criticisms of PAP. Whether compliance with PAP requires unreasonable upfront expenditure by the parties is considered in section III when the impact of PAP is assessed.

B *Defendant's Response*

The first point to note, regarding this aspect of PAP, is the language that is used. It is unfortunate that PAP labels the recipient of a Letter of Claim the 'defendant'. This term has no meaning outside of litigation.[12] PAP's overriding objective is to keep parties out of litigation, yet in endeavouring to do so it adopts the language of litigation. It would have been preferable to avoid language which immediately invokes thoughts of litigation, and instead use terminology such as 'respondent', or the more cumbersome 'party against whom a claim is made' rather than to mimic the language of the very institution from which PAP is trying to keep the parties away. Notwithstanding this criticism, this article will, for ease of understanding, use the language that is used in PAP.

PAP provides that the defendant has 14 days to acknowledge receipt of the Letter of Claim in writing. This acknowledgement must include details of the defendant's insurer, if any. If no such acknowledgement is received within 14 days, the claimant is relieved from further compliance with PAP.[13]

A defendant has 28 days from receipt of the Letter of Claim in which to provide one of two substantive responses. The first alternative is that the defendant objects to the Letter of Claim on one of the following three grounds, namely: (i) the court lacks jurisdiction; (ii) the matter should be referred to arbitration; or (iii) the defendant named in the Letter of Claim is the wrong defendant.[14] A failure to take such objections does not bar a defendant from raising such

12 *Macquarie Dictionary* (Federation Edition, 2001) defines 'defendant' as: '[A] party against whom a claim or charge is brought in a proceeding'.
13 PAP, pt 4.1.
14 PAP, pt 4.2.

claims in any subsequent proceedings, but the court may take such failure into account when considering the question of costs.[15]

If a defendant does not object on jurisdictional grounds, then it must serve a substantive Letter of Response within 28 days, or such further period agreed by the parties, up to a maximum of four months. In the response, the defendant must address all the matters set out in Figure 2 below.[16]

The facts set out in the Letter of Claim which are agreed or not agreed, and if not agreed, the basis of the disagreement.
Which claims are accepted and which are rejected, and if rejected, the basis of the rejection.
If a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection.
If contributory negligence is alleged against the claimant, a summary of the facts relied on.
Whether the defendant intends to make a counterclaim, and if so, giving the same information which is required to be given in a Letter of Claim.
The names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed.

Figure 2: Mandatory Requirements for a Defendant's Letter of Response

If the claimant does not receive the defendant's response within the requisite time period, the claimant may proceed without further compliance with PAP.[17]

In the UK prior to PAP, and in Australia still, defendants in construction disputes routinely respond to claims or demands with blanket denials. They maintain this approach for as long as possible, prolonging the day when they will have to provide particulars of their position in relation to the specific claims leveled at them. Needless to say, this tactic is unhelpful and hinders any attempt to settle or minimise the dispute. PAP makes such a strategy problematic since failure to comply with the requirements set out in Figure 2 above carries a risk of sanctions being imposed.

Before PAP, there was little opportunity or incentive for parties to consider the issues before embarking on the litigation treadmill. Evidence supporting each case was rarely collated, let alone tested before proceedings were launched.[18] PAP ensures that each party has thoroughly examined the merits of its claims and defences, and ensures that proceedings are not brought prematurely or at all.[19]

15 CPR, r 44.3(5)(a).
16 PAP, pt 4.3.1.
17 PAP, pt 4.3.2.
18 de Ferras, above n 6.
19 Lord Woolf, above n 2, 107.

C *Pre-Action Meeting*

PAP requires that after all parties have responded to the claims and counter-claims, they must meet as soon as possible.[20] It is unfortunate that PAP does not impose a time limit for the holding of this pre-action meeting. The requirement that the parties must meet 'as soon as possible after receipt of defendant's letter of response or receipt of any counter-responses'[21] is unnecessarily vague. The absence of an express time limit in which the meeting must take place is in stark contrast to the strict limits imposed for the earlier steps that the parties must undertake pursuant to PAP.

One possible reason for the flexible time frame may be to ensure that the disputing parties do not rush into the Pre-Action Meeting without allowing sufficient time to meet the objectives of the earlier steps. Nevertheless, the inclusion of a time limit (which could be extended by agreement) would still allow the parties to take full advantage of the earlier steps of PAP, but ensure that once this has occurred, the dispute does not linger unresolved. It is the authors' recommendation, as elaborated in section IV, that if PAP were to be introduced into Australian civil litigation, it should be modified in a variety of ways, including the addition of a prescriptive time limit in which the parties must conduct the Pre-Action Meeting.

At the Pre-Action Meeting, it is expected that legal representatives from both sides will be present along with representatives who have the authority to settle the dispute. If insurers are involved, or where a claim is being defended on behalf of another party, the party on whose behalf the claim is being made or defended should be present along with their legal representative.

At the Pre-Action Meeting the parties must deal with the matters set out in Figure 3 below.[22]

Agree on what are the main issues in the case.
Identify the root cause of disagreement in respect of each issue.
Consider whether, and if so how, the issues might be resolved without recourse to litigation (including referring the matter to some form of alternative dispute resolution).
If litigation is unavoidable, consider what steps should be taken to ensure that it is conducted with a view to minimising costs and delay, including for example the appointment of a joint expert and limiting document disclosure.

Figure 3: Matters to be addressed at the Pre-action Meeting

20 PAP, pt 5.
21 PAP, pt 5.
22 PAP, pt 5.

The requirement that the parties 'identify the root cause' of the dispute indicates that the Pre-Action Meeting should not simply focus on the superficial elements of the conflict, but rather look at the underlying causes of the disagreement and the real interests of the parties. By requiring parties to explore the background and motivation for the dispute, PAP is creating an environment where a genuine resolution of the dispute is more likely.

However, the authors question whether it is realistic to expect parties to achieve these aims without the assistance of an experienced neutral facilitator. If PAP included a requirement that a neutral third party facilitate the Pre-Action Meeting, there would be a significant increase in the likelihood of the meeting achieving its desired outcomes. A facilitator would help ensure that communication between the parties remains constructive, that issues and positions are clarified, and that the parties reach a mutual understanding of past events,[23] thus increasing the chances of settlement with relatively little increase in cost. Without a facilitator, the Pre-Action Meeting has the potential to become a mere formality on the road to litigation, rather than a genuine attempt to resolve differences. The clear purpose of the Pre-Action Meeting is to allow the parties to canvass the possibility of settlement, and if litigation is necessary, how the case can be conducted in the most efficient and effective manner. Yet the process outlined for achieving this is deficient and the authors argue in section IV that if PAP were to be introduced into Australia, this is one area which could be improved.

D *Limitation Period*

It is common to find that claimants leave filing a lawsuit until the limitation period has almost expired. PAP addresses this situation by providing that if a claimant, through adhering to PAP, will have its claim time-barred under any limitation legislation, then proceedings may be commenced without complying with PAP.[24] However, in these circumstances the claimant must apply to the court for directions as to the timetable and procedures to be adopted at the same time that the claimant requests the court to issue proceedings. The court may also consider whether to order a stay of the whole or part of the proceedings pending compliance with PAP.

III HOW IS PAP WORKING IN PRACTICE?

The history of PAP is relatively short, and therefore, any feedback on its success must be considered tentative. However, overall, there are indications that PAP is working well in practice with very few construction cases in which the parties have claimed that PAP served no useful purpose.[25] In this section, specific aspects of PAP are analysed including the cost of compliance with PAP, the emphasis on

23 Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners* (5th ed, 1998) 18-23.
24 PAP, pt 6.
25 Lloyd, above n 1, 92.

pre-litigation disclosure, the time limits imposed, and the use of sanctions for non-compliance. The section concludes with a consideration of whether the implementation of PAP has resulted in an increase in out-of-court settlements.

A *Cost Considerations*

The correspondence generated pursuant to PAP through the Letter of Claim and the defendant's response is a major benefit for practitioners and their clients. The early and thorough evaluation of the merits of the claim allows the parties to see the claim for what it is, and enables each party to assess whether the claim is worth pursuing. Each party can fully appreciate the other party's concerns, pinpoint precisely any problems with the arguments raised by the other party, and tailor their response accordingly.[26] A recent study of PAP for personal injuries claims[27] revealed that claimant solicitors appreciated the clearer structure PAP provided to the negotiation process, and were better prepared if litigation ensued.[28]

However, with these increased obligations come increased costs, and one of the criticisms of PAP is that it forces the parties to 'front-load costs'.[29] For example, to comply with PAP, the claimant, as well as the defendant, needs to thoroughly examine the grounds of their claims and defences and 'fully set out their case on causation and quantum and not leave them to be inferred'.[30] Achieving this will require the practitioner to identify relevant supporting documents. Construction projects are notorious for the huge amount of documents they generate, and isolating relevant documents can be a time consuming (and therefore expensive) task. Thus the pre-litigation work required in order to comply with PAP can lead to considerable amounts of time and money being spent at an earlier stage.[31]

Professor Michael Zander QC, a vocal critic of the Woolf reforms, suggests that cases subjected to PAP can be divided into three categories:[32]

(i) cases that would have gone to trial in the days before PAP and still end up at trial even after compliance with PAP;

(ii) cases that settle as a result of compliance with PAP, that would have gone to trial in the pre-PAP period; and

(iii) cases that would have settled even without PAP, and compliance with PAP has only added to the costs.

26 A recent survey of lawyers revealed that '[t]he majority of practitioners believed that the Letter of Claim and the Defendant's Response had, if only in part, enabled their client to know (to an acceptable level) the nature of the other side's case'. See McKenna and Cummins, above n 5.

27 There has been no detailed empirical study on the impact of PAP on the resolution of construction disputes.

28 Tamara Goriely, Richard Moorhead and Pamela Abrams, 'More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour' (Research Study No 43) The Law Society and Civil Justice Council (2002) 41.

29 Michael Zander, 'Where Are We Heading with the Funding of Civil Litigation' (2003) 22 *Civil Justice Quarterly* 23, 23-40.

30 Lloyd, above n 1, 93.

31 Ibid.

32 Zander, above n 29, 23-5.

Professor Zander argues that PAP only succeeds in saving costs in category (ii), and therefore the Woolf reforms which introduced PAP have not met their objective of reducing litigation costs. The authors believe that this conclusion fails to take into account some of the indirect benefits of PAP. For example, category (i) cases may still end up at trial, but the duration and complexity of the hearing may be reduced as a result of the parties using the PAP process to narrow the issues. PAP encourages parties who are not able to settle their entire disagreement to clearly define the matters in dispute with a view to the trial being narrow and focused. Thus the fact that a case still ends up going to trial is not necessarily evidence that PAP has been a failure, since the trial may be less complex, shorter, and therefore cheaper as a result of the parties having used PAP to reduce the number of issues to be tried.

The cost implication of PAP in category (i) cases is that there is a front-loading of expenditure. In other words, costs are incurred earlier than they would be without PAP. However, the TCC has indicated that it supports the expenditure of greater costs up-front on the basis that it will achieve cost savings in the long term. In *Burrells Wharf Freehold Ltd v Galliard Holmes Ltd*,[33] an application for pre-action disclosure was made in relation to alleged defects in the construction of 406 flats. The court granted the application, ordering that documents be produced which would enable the prospective claimant to compile an accurate and complete schedule of defects. Justice Dyson recognised the benefit of disclosure before proceedings by noting that it saves costs by closely defining the issues at an early stage, and helps dispose fairly of any anticipated proceedings.[34]

This rationale finds further support in a leading British construction law text, *Emden's Construction Law*, which states that shifting the emphasis of litigation from the trial to the preparation stage not only reduces costs, but encourages alternative resolutions to litigation.[35] Thus, while PAP does have the effect of front-loading costs, it does so in a controlled manner while increasing the possibility of settlement. This is preferable to the failure to fully pursue settlement, and ultimately incur significant costs during the course of litigation, where they can escalate in an unrestrained way.

Of course, a risk with incurring considerable legal costs early in the process is that it may make settlement more difficult. Parties entering into settlement discussions like to recover their out of pocket expenses, and if these are significant, that may be a barrier to reaching a compromise. Although in the short term this may be a problem, PAP nevertheless sets a standard that encourages a change in litigation culture that will be beneficial in the long term as the spirit and inherent value of PAP is better understood by practitioners.

33 [1999] 2 EGLR 81 ('*Burrells Wharf* Case').

34 Ibid 83. However, an order for pre-action disclosure will only be exercised where it is desirable to achieve the purposes of dealing with the case fairly, efficiently, and to assist with negating the need for proceedings. The objectives are set out in CPR r 31.16(3)(d).

35 Andrew Bartlett (ed), *Emden's Construction Law* (2002) vol 1(62), 1356.

Professor Zander argues that PAP positively disadvantages the parties in cases that fall into category (iii) because compliance with the rigid PAP rules leads to cost increases in cases which were always going to settle. However, such analysis ignores the fact that parties can always settle their dispute without adhering to PAP. Compliance with PAP is only mandatory *if* the claimant wishes to commence proceedings. Disputing parties are always free to pursue other methods of dispute resolution to which PAP does not apply, including, for example, arbitration, expert determination or mediation. Parties are free to explore whatever process they feel will lead them to a commercial settlement. Only if that fails, and they decide they want to litigate their claim, will they be forced to comply with PAP.

B *Document Exchange and the Abuse of PAP*

Interestingly, PAP does not require that the Letter of Claim and the Defendant's Response identify or attach key documents on which the claim is based. It is therefore open to an unreasonable claimant to refuse to disclose relevant documents.[36] This in effect means that a defendant may have to apply to the court for pre-action disclosure in order to extract necessary information from the claimant. Although this was successfully done in the *Burrells Wharf* case, it does require the parties to engage in an unnecessarily expensive and frustrating exercise, and is hardly in keeping with the overriding objective of PAP.[37]

Yet there may be tactical reasons why a claimant might refuse to provide sufficient information. For example, a claimant may wish to elicit a response from the defendant and hope to engage in alternative dispute resolution, or else have a chance of settling the dispute before disclosing documents that may be adverse to its claim. The claimant may also wish to keep some element of surprise in case the parties proceed to litigation. Disclosing all documents to the other party at the outset means that the other party knows what they are up against and can bolster its defence.

On the other hand, a claimant may provide volumes of unnecessary information, which means the defendant must expend a considerable amount of time and money sifting through the documents in order to understand the nature of the claim. One UK practitioner reports that he received a Letter of Claim that consisted of eleven lever arch folders.[38]

It is the authors' view that such an important issue as document disclosure should not be left to be inferred, and that PAP could be improved by including clearer requirements regarding the nature and extent of document disclosure.

36 Claimants refusing to disclose key documents to enable a defendant to understand the nature of the claim was a problem identified in a recent survey of construction lawyers on their experience with PAP. McKenna and Cummins, above n 5.

37 The objectives of PAP are (i) encourage the exchange of early and full information about the claim before commencement of proceedings; (ii) to enable parties to avoid litigation by agreeing to a settlement of the claim before commencement of proceedings; and (iii) to support the efficient management of proceedings where litigation cannot be avoided. PAP, pt 1.3.

38 McKenna and Cummins above n 5.

C *Asymmetrical Time Limits*

The time constraints that PAP places on defendants is another area that has raised considerable debate.[39] Claimants have as much time as they wish to prepare their claim and collate all relevant documentation, including expert opinions (subject only to the statutory limitation period). During this time, defendants may have no idea that a claim is about to be issued. When the claim is brought to their attention, defendants have the relatively short period of 28 days from the date of receipt to respond (unless the claimant consents to an extension of this period). Providing a response may require that relevant employees be interviewed (many of whom may no longer be employed by the defendant), archived files be retrieved, and expert witness statements be collected and examined. In complex construction cases, the strict time limit imposed on defendants to respond may be unreasonable. Defendants who do not act immediately once a Letter of Claim is received will be at a considerable disadvantage.[40]

However, the obligation on the defendant to respond within a short time span means that both parties have actively begun articulating concerns to each other at an early stage, and limits the chance that the matter may drift for a considerable period of time. The possibility of resolution is also heightened as the parties have little time to take entrenched positions on the dispute. It is likely that without PAP provisions requiring a quick and detailed response by defendants, the chances of a swift resolution would be significantly reduced.

Further, although it is still open for an unreasonable claimant to refuse to extend the 28 day period within which the defendant must respond, any conduct by the claimant that fast-tracks litigation without allowing sufficient time for the parties to seriously consider settling beforehand, will not be looked upon favourably by the TCC, and it has previously stayed proceedings until full compliance with PAP was achieved.[41]

D *Streamlining the Litigation Process*

If compliance with PAP leads the parties to conclude that litigation is unavoidable, they must proceed with the objective of enabling the courts to deal with the case justly and expediently with a view to saving costs.[42] This means that the parties must consider whether there is an area where a joint expert may be appointed, and to identify candidates if possible.

It is likely that a single expert will be appointed where the sums at stake are relatively small or the evidence the court needs to consider is relatively

39 See, eg, Richard Highley, 'Wholesale Changes to the English Civil Justice System Go into Effect' (1999) 66 *Defence Counsel Journal* 334, 335; Andrew Burr and Richard Honey, 'The Post-Woolf TCC: Any Change' (2001) 17(5) *Construction Law Journal* 378, 378-94; and Martin Mears, 'Woolf: The Jury is Still Out' (2000) 150(6961) *New Law Journal* 1731.

40 Highley, above n 39, 334, 335.

41 McKenna and Cummins, above n 5.

42 CPR, pt 1.1.

uncontroversial.[43] In any event, any experts appointed must act objectively, and their duty to the court overrides their duty to the client.[44] The reason for the new approach is that experts can multiply, not narrow the issues and promote unacceptable delay and costs,[45] and become more partisan than the parties.[46]

The TCC will penalise any adversarial approach from an expert by disallowing costs. In *Stevens v Gullis*,[47] the Court of Appeal, with Lord Woolf MR (as he then was) delivering the leading judgment, held that where an expert building surveyor had not conducted himself in accordance with CPR Part 35, the judge should have disallowed the party from calling the expert. If this resulted in a lack of evidence for a claim, then the claim should fail.[48] In *Pozzolanic Lytag v Bryan Hobson*,[49] Justice Dyson also criticised the inappropriate use of expert evidence by litigators, stating: 'In view of the imminent implementation of the Woolf reforms, it is now opportune for everyone who is concerned in civil justice to take a hard look at the whole question of expert evidence.'[50]

Under PAP, parties must also use their best efforts at the Pre-Action Meeting to reduce 'the extent of disclosure of documents' and consider the conduct of litigation.[51] Before PAP, it was common for parties to use the discovery process to disclose every single document generated during the project, while only a referring to small fraction of the documents during the actual proceedings.[52] One of the major considerations of whether a document must be disclosed is whether the document is likely to affect the outcome of the case.[53]

E *Lack of Sanctions for Non-Compliance*

PAP imposes a positive obligation on parties to consider non-litigious ways in which the dispute maybe resolved. The TCC has demonstrated that it is willing to impose sanctions if the parties do not fully consider all the alternatives before deciding to litigate. In *Mars UK Ltd v Teknowledge*,[54] payment of costs was reduced to take into account the parties' unreasonable behaviour in pursuing the matter to litigation. A similar result was reached in *Paul Thomas Construction v Damian Hyland and Jackie Power*,[55] where the claimant refused to participate in an adjudication unless the defendant paid the entire cost of it. Judge Wilcox held that this conduct was unreasonable and the appropriate sanction was for the claimant to pay the defendant's cost on an indemnity basis.

43 Justice Dyson, above n 8, 335, 344.
44 CPR, pt 35.3.
45 Highley, above n 39, 337-9.
46 See *Abbey National Mortgage plc v Key Surveys Nationwide Ltd* [1996] ECGS 23.
47 [1999] 10 BLR 394.
48 Ibid 396.
49 [1999] 6 BLR 267.
50 Ibid 274-5.
51 PAP, pt 5.5(ii).
52 Justice Dyson, above n 8, 337.
53 Highley, above n 39, 339.
54 [2000] FSR 138.
55 [2001] CILL 1784.

However, it appears that while the TCC is willing to strictly enforce compliance with PAP, not all courts are similarly minded. There is some evidence that lawyers who should be applying the Pre-Action Protocols and courts charged with administering them are not overly concerned with ensuring that Pre-Action Protocol procedures have been complied with. If the Pre-Action Protocols are to meet their objectives of reducing and streamlining the civil litigation landscape, then they must be supported by all branches of the legal profession. There have been instances reported where courts have asked parties at case management conferences whether they have complied with the requirements of the relevant protocol, and the parties have responded 'yes' even when they have not. The courts in these cases did not look behind this, or seek details of the compliance.[56] One in three claimant solicitors who work in the personal injury field indicated that lack of sanctions by the courts for non-compliance with the Personal Injury Protocol was a major concern.[57]

F *Does PAP Encourage Settlement?*

Evidence on the success of PAP is limited, as there has not yet been any in-depth empirical research conducted on the impact it is having on construction disputes. However, a review of the civil justice reforms, including all eight pre-action protocols, was conducted in August 2002 and found that the protocols were 'working well to promote settlement and a culture of openness and cooperation'.[58] The review concluded that Pre-Action Protocols contributed to better communication, better exchange of information, earlier investigation by defendants, improved opportunities for settlement, and clear ground rules on how to formulate and respond to claims and focus on the key issues at an early stage.[59]

It is clear that litigation in the TCC has reduced substantially in the years since PAP came into effect.[60] However, this may be due to a number of factors including the adjudication requirements under the *Housing Grants, Construction and Regeneration Act 1996* (UK), and a general increase in alternative dispute resolution mechanisms, such as meditation.

Nevertheless, there are indications that PAP has played its part in the increase of out-of-court settlements. For example, a recent survey of construction solicitors revealed that PAP has provided clarity on some matters, which in turn led a number of claimants to discontinue their claim.[61]

56 Ibid. McKenna and Cummins assert that some judges are willing to allow parties to proceed without complying with the protocol requirements, if that is their collective wish and will not enquire too deeply into any non-compliance: McKenna and Cummins, above n 5.

57 Goriely, above n 28, 42.

58 Lord Chancellor's Department, *Further Findings* (August 2002) [3.13].

59 *Chapter 5: Resolving Disputes at the Lowest Appropriate Level* [128], [142] <www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/5D5CFBD87C6A5DE0CA256E52000247E6/$FILE/0+ch+5+resolving+disputes+at+lowest+level+chapter+clean.doc> at 1 February 2005.

60 Lloyd, above n 1, 92.

61 McKenna and Cummins, above n 5.

The proliferation of pre-action protocols is a further indication that they are successfully meeting their objectives in reducing litigation. In addition to the specialist protocols, there is also a general pre-action protocol which makes it clear that the courts expect litigants to follow the spirit of PAP and behave reasonably in the exchange of information and the disclosure of documents where a specific pre-action protocol does not apply.[62]

A research study was commissioned to examine the impact of the Woolf reforms on pre-action behaviour in relation to personal injury, clinical negligence, and housing disrepair matters after the reforms had been in place for two years.[63] The study revealed that CPR Part 36[64] was useful in preventing delays in reaching settlement in personal injury,[65] clinical negligence,[66] and housing disrepair matters.[67] However, it was the pre-action protocols that gave a clearer structure to the negotiation process, initially focusing minds on the key issues at an earlier stage, encouraging greater openness and smoothing the way to settlement.[68] The research was mainly qualitative and involved interviews with 54 lawyers, insurers and claims managers on what impact the reforms have had on their practice. The interviews were supplemented with a study of files which compared some 150 claimant solicitors' files concluded before April 1999 (pre-Woolf) with approximately 150 files opened by the same firms after April 1999 (post-Woolf) and closed by the time of the study.[69] This examination of files found that since the introduction of the pre-action protocols, the first offer to settle was made much earlier, and the time between the first offer being made and a concluded settlement being reach had reduced. Furthermore, where settlement was not possible, solicitors were better prepared for court proceedings.[70]

IV IS AUSTRALIA READY FOR PAP?

Several signs point to the fact that Australia may be willing to consider introducing civil litigation reforms along the lines of PAP. The first indication that Australia might be ready for PAP is the speed and enthusiasm with which society generally, and the construction industry in particular, have embraced alternative dispute resolution mechanisms. This suggests not only a level of dissatisfaction with the traditional court system, but also a willingness to explore quicker and more cost effective solutions for their disputes.[71] Victorian courts

62 *Practice Direction – Protocols* [4.1] <www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm> at 1 February 2005.
63 Goriely, above n 28, 143.
64 Relating to the cost consequences of Offers to Settle and Payments into Court.
65 Goriely, above n 28, 143.
66 Ibid 265-70.
67 Ibid 367-9.
68 Ibid xiii.
69 Ibid xi.
70 Ibid 41, 162.
71 Jeffrey Wilson, 'Countdown to the Security of Payment in Victoria' (2003) available at <www.deacons.com.au/news/article.asp?nID=280> at 1 February 2005.

have supported this shift, and judges now regularly refer cases to mediation.[72] In *ACCC v Cadbury Schweppes Pty Ltd*,[73] Gray J ordered the parties to mediation, regardless of the fact that the plaintiff advised the court that it preferred not to mediate, and pleadings had not yet closed. At the directions hearing, his Honour stated:

> If you're going to mediation you're going before any further pleadings. I don't believe in incurring the extra costs of pleadings. All of the mediation studies tend to suggest that the less that is put in writing by lawyers, the faster people get to mediating about the real issues because they don't have to go through all the clamour about the outrageous allegations that the other side's lawyers have made against them. So if you're going to mediation you're going now. ... You can go and make love before you make war ... not the two simultaneously; it doesn't work.[74]

As evidenced by Gray J's comments, a court order that parties participate in mediation often comes late in the litigation process, when the case is ready to be set down for trial, by which time considerable time and money have already been expended on the litigation steamroller. While the judge's comments do not specifically relate to PAP, they clearly indicate support for the philosophy of PAP, namely that parties should be encouraged to resolve their disputes early with minimal legal formality.

A further indicator that the construction industry is ready to look at alternatives to litigation is the introduction of the *Building and Construction Industry Security of Payment Act 2002* (Vic), which requires that commercial construction disputes regarding payment be referred to an adjudicator for a summary determination.[75] This provides parties with a fast and affordable way of recovering unpaid sums without the need to commence court proceedings. It is, however, limited in its scope as it applies only to disputes regarding progress payments, thereby excluding disputes relating to such issues as time, defective work and variations, which make up a large part of construction claims.

Introducing PAP into the Victorian civil litigation landscape would compliment the ethical rules under which solicitors operate. In particular the *Victorian Professional Conduct and Practice Rules 2003* provide that:

> A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.[76]

72 *Supreme Court (General Civil Procedure Rules) 1998* (Vic) r 50.07 and *County Court Rules of Procedure in Civil Proceedings 1999* (Vic).
73 (2004) FCA 516.
74 Transcript of proceedings in *ACCC v Cadbury Schweppes Pty Ltd* (Federal Court of Australia, Gray J, 22 April 2002).
75 See s 23. Similar legislation already exists, or is being developed, in all other States and Territories.
76 Rule 12.2A.

Thus lawyers have an ethical duty to advise their clients about alternatives to litigation. Although the language is vague as to when such advice should be given, and weak – to *inform* the client about ADR, rather than using all efforts to *encourage* the client to use ADR as a first resort – it is nevertheless recognition of the role that lawyers should play in encouraging clients not to rush into litigation.

A *Existing Pre-Action Procedures in Australia*

The final sign that Australia is perhaps ready for PAP is the fact that some jurisdictions have already introduced minimal pre-action procedures. The South Australian Supreme and District Courts have introduced a requirement that a plaintiff notify defendants of its intention to file a claim at least 90 days prior to commencing proceedings.[77] This is really a poor relation to PAP since there is no requirement that a potential defendant respond to such a notice, and no further obligations imposed on the parties to explore settlement before proceeding with litigation. Nevertheless it is apparently working well and the legal profession has not resisted the initiative.[78] It is a step in the right direction, although it falls well short of the reforms mandated by PAP.

Queensland has also introduced PAP-like provisions relating to personal injury claims. Plaintiffs must give notice to defendants within specified time frames,[79] and unlike the South Australian provisions, defendants must provide a preliminary response within one month.[80] The required response is similar to the initial response that a defendant must give under PAP if it wishes to challenge on jurisdictional grounds. Prospective defendants are not required to respond regarding the substantive merits of the claim. Like South Australia, the Queensland initiative falls well short of the innovative reforms of PAP, which require the parties to do so much more than simply give notice to prospective parties.

The Family Court is the Australian jurisdiction that has gone the furthest in terms of mandating that parties attempt to resolve their disputes before commencing proceedings. The *Family Law Rules 2004* provide that '[b]efore starting a case, each prospective party to the case must comply with the pre-action procedures... including attempting to resolve the dispute using primary dispute resolution methods'.[81]

77 *South Australia Supreme Court Rules*, r 6A.
78 Tony Abbott, 'Courts and the Public' (Speech delivered at the Australian Institute of Judicial Administration Conference, Brisbane 13-14 July 2002) [16] <www.aija.org.au/ac02/Abbott.rtf> at 1 February 2005.
79 *Personal Injuries Proceedings Act 2002* (Qld) s 9(3).
80 *Personal Injuries Proceedings Act 2002* (Qld) s 10(1).
81 Rule 1.05

The objects of the pre-action procedures referred to in the above rule are spelt out in detail in a schedule to the *Family Law Rules 2004*[82] and are summarised in Figure 4 below.

Encourage early and full disclosure by the exchange of information and documents about the prospective case.
Provide parties with a process to help them avoid legal action by reaching a settlement of the dispute before starting a case.
Provide parties with a procedure to resolve the case quickly and limit costs.
Help the efficient management of the case, if a case becomes necessary (by ensuring that parties have clearly identified the real issues which should help to reduce the duration and cost of the case).
Encourage parties, if a case becomes necessary, to seek only those orders that are reasonably achievable on the evidence.

Figure 4: Objectives of Family Court Pre-action Procedures

These pre-action procedures apply to all Family Court cases except those which are of an urgent nature, or the case is inappropriate for such procedures.[83]

In many ways the specific requirements of the Family Court procedures are more detailed and onerous than the UK PAP. For example, they include provisions mandating that the parties make a genuine effort to resolve disputes before commencing proceedings by participating in a primary dispute resolution process, such as mediation.[84] Parties are also required to explore options for settlement by correspondence, and to avoid raising irrelevant issues, or issues that may cause the other party to adopt an entrenched, polarised or hostile position.[85] In addition, there are specific obligations regarding full and frank disclosure of all information relevant to the issues in dispute.[86] There are also detailed provisions relating to expert witnesses[87] as well as the obligations of lawyers.[88]

Although the Family Court expects parties to comply with the pre-action procedures unless there are good reasons not to do so, compliance is not a pre-condition to filing proceedings. However, the Court has power to take

82 *Family Law Rules 2004* sch 1.
83 For example, because of family violence, or allegations of fraud.
84 *Family Law Rules 2004* sch 1, s 1(1)(a).
85 *Family Law Rules 2004* sch 1, s 1(7)(b).
86 *Family Law Rules 2004* sch 1, s 4 which includes a precise list of documents expected to be disclosed in different classes of action, for example, in a maintenance case a party's tax return and in a property settlement case documents relating to superannuation interests.
87 *Family Law Rules 2004* sch 1, s 5 which includes a requirement that 'if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties'.
88 *Family Law Rules 2004* sch 1, s 6.

compliance or non-compliance with the pre-action procedures into account when making orders about case management and costs.[89]

The Family Court procedures have only been in operation since March 2004, so it is too early to tell how they are working in practice. However, early indications are that there may be some problems including, that the pre-action procedures may be used as a delaying tactic; it may be difficult to decide when to start the pre-action procedures (parties may spend time negotiating but not reach a settlement, and then have to follow the pre-action procedures causing extra expense and delay); since starting the pre-action procedures too early may increase costs and tension between the parties.[90]

Interestingly, the Federal Magistrates' Court, which also has a family law jurisdiction, has not introduced any pre-action procedures. Parties in a family law case can therefore effectively 'forum shop' to avoid the pre-action requirements of the Family Court by filing their case in the Federal Magistrates' Court.

All of the above initiatives suggest that Australia is indeed ready to explore ways in which litigation might be avoided, or if litigation is necessary, how it can be conducted more efficiently. It is therefore appropriate to consider how PAP could best be introduced into the Australian construction litigation landscape.

B *Trial Implementation of PAP for Construction Disputes in Victoria*

PAP in England was implemented as part of a larger set of reforms which replaced the existing civil procedure system.[91] The authors suggest that before such sweeping changes are considered for Australia, it would be appropriate to carry out a trial implementation of PAP for construction disputes in Victoria. A limited, experimental deployment of PAP would provide empirical data on which an informed decision could be made regarding more widespread implementation.[92] Although there is no specialist court for construction matters equivalent to the TCC in England, there is internal specialisation within the general courts, as part of the overall case management regime. Thus both the Victorian Supreme Court and the Victorian County Court have designated Building Lists for construction cases.[93]

89 See *Family Law Rules 2004* rr 1.10(2)(d) and 11.02. It should be noted that the Family Law Section of the Law Council of Australia opposes this aspect of the pre-action protocols, on the grounds that it may generate unnecessary arguments about costs.

90 Aitken Walker Strachan, *Family Law Newsletter* available at <www.aitken.com.au/publications/FLMay04.htm> at 3 February 2005.

91 *Civil Procedure Act 1997* (UK).

92 A Commission report on better management of the federal civil justice system stated that for successful reform, any new system must be grounded in empirical research 'as depreciation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption'. Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) [1.27].

93 *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* O 3, and *County Court Rules of Procedure in Civil Proceedings 1999* O 34A.

The *Supreme Court (Miscellaneous Civil Proceedings) Rules 1998* (Vic) relate specifically to building cases in the Supreme Court. It would be relatively straightforward to insert a new requirement into Order 3, Chapter II of these rules to the effect that the Prothonotary may not issue a writ in a building case unless the plaintiff has also filed a 'PAP checklist', indicating that all steps required by PAP have been undertaken. In addition, there would be further opportunity to ensure that PAP is complied with through the judges in charge of the Building Lists issuing appropriate practice directions.

As has been intimated earlier in this article, the authors believe that various improvements could be made to PAP to make it more appropriate for Victoria's construction disputes. The following sections examine four improvements which the authors recommend be made to PAP before it is applied to construction cases in Victoria.

1 *PAP Checklist*

In England, legal practitioners must notify the TCC of compliance with PAP by filling out a case management information sheet consisting of two simple yes/no boxes which the legal practitioner must tick.[94] This process provides the TCC with very little detail regarding the actual steps that the parties have taken. If a judge wishes to know the exact pre-litigation efforts of the parties, then this issue can only be tackled during proceedings, which can be unnecessarily time consuming and costly.

To address this issue the authors suggest that if PAP were to be introduced in Victoria, it be modified to require that the court not issue a writ in a building case unless the plaintiff simultaneously files a 'PAP checklist,' indicating that all necessary steps have been complied with. Such a checklist would require that the plaintiff details all the steps that have been undertaken by the disputing parties prior to commencing litigation. Such a checklist would better inform judges of the pre-litigation efforts made by the parties, and whether proceedings should be stayed if full compliance with PAP has not been achieved.

2 *Additional Time Limits*

A second possible improvement to PAP would be to impose time limits for the holding of the pre-action meeting. PAP in England states that parties must attend a pre-action meeting 'as soon as possible after receipt of defendant's letter of response or receipt of any counter-responses'.[95] As discussed above, the absence of an explicit time limit for the parties to meet, potentially leads to the matter lingering longer than necessary. Therefore, one recommendation for the Victorian model of PAP is that it be more prescriptive and stipulate a time period in which the parties must meet. As stated earlier, it is also recommended that the

94 Technology and Construction Court, *Case Management Information Sheet* <www.courtservice.gov.uk/cms/3588.htm> at 6 April 2005.

95 PAP, pt 5.

pre-action meeting be facilitated by a neutral third party, preferably an experienced mediator.

3 *Full Disclosure*

The intractable problems of parties withholding documents, as highlighted above, could be addressed by imposing an express obligation on the parties to disclose key documents at the pre-litigation correspondence stage. Although an obligation may be inferred from the objectives of PAP, which state that parties should disclose 'early and full information',[96] in practice, the absence of an express provision has contributed to document withholding behavior as illustrated above. Such a modification would allow parties to better assess the strengths of their case increasing the possibility of an out-of-court settlement.

The clarity and certainty with which Schedule 1 of the *Family Law Rules 2004* addresses disclosure obligations could serve as a useful precedent for addressing similar issues in a Victorian PAP dealing with construction disputes.

4 *Recoverable Costs*

The final recommendation that the authors suggest for improving PAP for construction disputes in Victoria is that the court be given express power to make an order that the costs of compliance with PAP be recoverable. This would address some of the problems raised above, and compensate a party for any unreasonable behavior on the part of the unsuccessful party during the pre-litigation period, for example, failing to disclose relevant documents. Recoverable PAP costs would dissuade a party from this type of behavior.

V CONCLUSION

To address the escalation of litigation in England, the TCC has responded with one of the most innovative reforms in the common law world. The widespread overhaul of the civil litigation landscape, and the refocus of commercial construction disputes, through PAP, from trial to the pre-litigation stage, has stemmed the frivolous use of the court system and the construction industry's over indulgence in litigation. Although PAP has left some practitioners skeptical as to its effect, due to the front-loading of costs and the time limits imposed, the majority of practitioners and clients were dissatisfied with the adversarial system and have embraced these reforms.

Victorian construction lawyers are frustrated with the litigation process, and are willing to explore reforms that are commercially sensible.[97] In addition, we have

96 PAP, pt 1.3.

97 Joanna Harris and Bronwyn Lincoln 'Settling Victorian Disputes Early: English Tactics Avoid the Ruck and Maul' <www.findlaw.com.au/articles/default.asp?task=read&id=10870&site=GN> at 1 February 2005.

a relatively new Chief Justice of the Supreme Court who has indicated a willingness to look at ways of improving the practices and procedures of the Supreme Court.[98] These two factors suggest that the time may be right to reinvigorate construction litigation by introducing reforms for commercial building disputes. PAP in England provides a useful model for litigation reform, but there are several areas where it could be improved in order to provide a civil justice system that better serves the needs of parties in construction disputes.

98 Marilyn Warren, 'Supreme Court Reclaims Jurisdiction' 78(7) *Law Institute Journal* 24.